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UNIVERSITY OF ALBERTA

A COMPARATIVE STUDY ON THE EVIDENCE LAW AS TO WITNESSES AND TESTIMONY IN CANADA AND CHINA

BY

HE EN CHEN ©

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfilment of the requirements for the degree of **MASTER OF LAWS**.

FACULTY OF LAW

Edmonton, Alberta

FALL, 1993

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The undersigned certify that they have read, and recommended to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled **"A Comparative Study on the Evidence Law as to Witnesses and Testimony in Canada and China"** submitted by **He En Chen** in partial fulfilment of the requirements for the degree of **Master of Laws**.

Jim Robb
Professor Jim C. Robb
(Supervisor)

Professor Bruce P. Elman

Professor Brian L. Evans

Dated Oct. 4.. 1993

This Thesis is Dedicated to My Parents and My Brothers

ABSTRACT

Evidentiary styles as to witnesses and testimony in Canada and China bear enormous distinctions. These differences are the marked complexity of Canadian evidence rules versus the simplicity of corresponding Chinese rules. However, there is also a manifest trend that, driven by the same goal of truthfinding, the two evidentiary styles are approaching one another to a very large extent.

The objective of this thesis is to appraise the above two aspects through a comparison of the evidence laws with respect to witnesses in Canada and China. This study begins with an general discussion on the adversarial process and the inquisitorial process which determine the choices of evidentiary structure in the two countries. Then an attempt is made to analyze why the two evidentiary systems are so different.

The second chapter of this thesis focuses on testimonial competence and compellability in the two countries. This chapter continues to discuss the differences and similarities in the two evidence systems, and tries to find the points which each system could take into account for improvement.

The third chapter discusses privilege and confidential communications. A comparative discussion is provided following the general appraisal in this regard.

Chapter four deals with the rules guiding the examination of witnesses. Also, along with a comparative analysis, some recommendations for the reform of each system are advanced.

The fifth chapter examines the rules with respect to hearsay and opinion evidence.

Together with a comparative appraisal. Further, suggestions for enhancing the effectiveness of using hearsay and opinion evidence in the two modes of criminal processes are provided.

The thesis is concluded by summarizing the legal analysis presented in the previous chapters. From the review of distinctions and similarities between the two systems, suggestions are made for improvement in each country. However, it is concluded that it would be a mistake to conclude that one evidentiary style is more effective in truthfinding than the other.

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INTRODUCTION

The comparison of common and civil law evidence rules systems as to testimony has long attracted the attention of comparativists. Within the common law jurisdictions, jurists have considered it worthwhile to study thoroughly the continental evidentiary structure and to compare it with their own evidence laws.[1] The force motivating this examination has been not only scientific interest but also a hope of utilizing elements of the civil law system to help the reform of their evidence systems. Stemming from the same purposes, many Chinese scholars have explored common law evidentiary rules on a theoretical and empirical level.[2]

However, it is different to draw precise and satisfying conclusion from a general comparison of the two evidence systems as to testimony. First, within each system, proof processes vary from jurisdiction to jurisdiction. It is only possible to generalize the evidentiary styles bearing some common features on a rather general level. Second, evidentiary rules are not applied with equal vigour in all kinds of criminal cases, even in a single jurisdiction. Third, there is a cultural lag between evidence law and the realities of the society in which the law is supposed to operate. It is therefore not easy to comprehensively capture reflecting the real thrust of the two systems. Finally, conceptual tools and systematic arrangements in the civil and common law differ so widely in the evidence law area, that one finds oneself groping for common denominations in order to make issues comparable.

---

[1] M.Damaska, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study" (1973) 121 U. Pa. L. Rev. 506; M.Damaska, "Structures of Authority and Comparative Criminal Procedure" (1975) 84 Yale L.J. 480; A.S. Goldstein, "Reflections on Two Models: Inquisitorial Themes in America Criminal Procedure" (1974) 26 Stan. L. Rev. 1009; M. Plowcowe, "The Development of Present-Day Criminal Procedures in Europe and America" (1935) Harv. L. Rev. 433.

[2] O Yang Tao, *et al*, *Introduction of the English and American Criminal Law and Criminal Procedure* (Beijing: Chinese Social Science Press, 1984). Cao Sheng Lin, "Comparison of Witnesses' Testimony" (1986) 1 Overseas Jurisprudence Journal 22; Chen Guang Zhong, "The Study on Chinese Procedure Law in the Past Forty Years" (1989) 4 Journal of University of Chinese Politics and Law 5 at 8; Wu Lei and Wang Xin Qing, "Chinese Criminal Procedure Law Needs to be Improved" (1989) 3 Journal of University of Chinese Politics and Law 19.

Despite the difficulties of comparison, by focusing on two discrete evidence systems in two countries - one belonging to the common law tradition and one a civil law tradition, we should be able to create a comparative picture. Believing this premise is true, the writer of this thesis will endeavour to appraise the two evidentiary styles of witnesses in the following countries: Canada and China. As a common law variant, the Canadian evidence body inherits the spirit and structure of the English law; while the corresponding Chinese part is in the style of the continental law. The comparative view of the two styles will be meaningful for collecting knowledge of a different system and for improving each system. More importantly, it is hoped that this comparison in the two single jurisdictions will reflect, in some degree, the general characteristics and movements of the common and civil law as to testimonial evidence on the whole.

Wherever evidentiary structures in common and civil law are compared, two beliefs are frequently voiced. One is that evidence rules as to witnesses under the common law adversarial system of criminal procedure presents a far more complex network of barricades to truth-finding than do corresponding rules in the non-adversarial civil law system. Another belief is that the very nature of criminal processes and the same end goal of truth-finding in both the adversary procedure and the inquisitorial procedure have led the two evidentiary styles to move towards one another. The two aspects should also be reflected in the comparison of the evidence law in Canada and China.

The theme of this thesis is to generally appraise evidence law regarding witnesses in criminal trial in Canada and China. By identifying the contrasting and similar points under both systems, I intend to examine how much the two beliefs above mentioned will be responded to by this comparison. It shall be emphasized at the outset that these two aspects are the important threads throughout the whole examination.

The wide range of rules regarding witnesses leads to the impossibility of embracing every aspect of this field in the length of this thesis. It is also impossible to discuss one aspect in great detail by reason of the complex body of the Canadian rules of testimony. Thus, in this comparison I shall focus only on those aspects of the testimonial evidence rules which seem to me characteristic of the respective evidentiary style. To adopt this limitation may be thought to eliminate the representational accuracy. However, this will enable me to extract and compare the more salient features of each system while avoiding fruitless analysis of minutiae.

In addition to this general introduction, five elements will be examined in independent chapters: (1) the two modes of criminal processes; (2) competence and compellability; (3) privileges: (4) examination of witnesses and; (5) opinion rule and hearsay rule. The last part will be the general conclusion.

It is believed that one evidentiary style is related to the mode of criminal procedure in which it is supposed to operate. Therefore, it is necessary, before embarking on the discussions on rules of witnesses, to observe the nexus between these two elements. Of course, one cannot set one's mind free to speculate on this theme before obtaining a clear idea of the essential characteristics of the Canadian adversary process and the Chinese non-adversary process. Therefore, the task of chapter I is to appraise two issues. First, the general differences between adversarial and inquisitorial system will be reviewed. Three factors are examined: (1) jury or non-jury trials; (2) party-presentation or non-party-presentation; (3) neutrality of the judge at trial or the active control of the judge. The underlying historical, social, political and cultural environment under each system will be examined. The effectiveness of each process is to be looked at as well.

Second, the connection between evidentiary styles and choices of the mode of criminal proceedings will be emphasized. It is important, for the purpose of gaining a thorough understanding of the theme in this thesis, to understand first why Canadian law of evidence appears so complex and technicial whereas the Chinese counterpart is simple and flexible.

Chapter II deals with testimonial competence and compellability of witnesses. A general outline of rules in the two countries will be exhibited respectively. On the Canadian side, three elements as to competence are to be outlined: (1) sworn and unsworn testimony; (2) the incompetence of the accused and co-accused; (3) spousal incompetency. On the Chinese side, appropriate attention shall be paid to the distinction between the procedural status of the accused, the victim and ordinary witnesses. Based upon this distinction, an examination of general rules as to competence and compellability will be forwarded.

Against the background provided by this exposition, a comparative examination of the two systems, including similarities and contrasts, will be offered. This part involves ideological and political analyses, as well as a discussion on the felt trend that the two systems are approaching towards one another.

Privilege and confidential communications are dealt with in chapter III. Special attention is to be paid, in the Canadian law, to the accused's right against self-incrimination at three different proceedings (pre-trial stage, trial process and public inquiries). As to privileged communications, client-solicitor communication and marital conversations will be discussed. Other confidential communications unprotected by privilege, such as physician-patient conversation, are also addressed. Finally, in the area of public interest privilege, protection of the police informer will be dealt with. In the Chinese law, because of its simplicity on this issue, only the client-solicitor privilege will be discussed.

Accordingly, the comparison on this subject will be largely related to the contrast between the complex Canadian evidentiary style and the simple Chinese approach in the same field. Various social policies and philosophies underlying each system will be analyzed. However, an endeavour is also made to point out the similarities and the recent Canadian development toward the commitment to search for truth.

Chapter IV examines evidentiary rules guiding the conduct of examination of witnesses at trial. Particular attention is to be paid to the pattern of direct examination and cross-examination under Canadian law and the lack of distinction between the two stages of examination in Chinese law. However, details of procedures of the examination are not discussed in this chapter.

Based upon this difference between the two procedures, rules as to leading questions, refreshing memory, impeachment and accreditation of witnesses are briefly exposed respectively along the line of Canadian and Chinese law. Among them, rules governing the attacking or supporting of one's own witnesses and usage of character evidence under Canadian evidence law will be discussed in relatively greater detail. On the Chinese side, the principles of relevance and materiality guiding the admissibility of character evidence deserves careful discussion.

In this vein, the merits and demerits of each system are to be observed from a comparative point of view. In addition, similarities and contrasts between the two styles need to be examined. Stemming from the above analysis, a move to improve both systems: the Chinese adopting appropriate cross-examination on one hand; the Canadian simplifying its bewildering mechanism of rules as to examination of witnesses on the other hand, will be advanced.

Chapter V explores the opinion rule and the hearsay rule in the two countries. As to the opinion rules, two issues are examined: expert opinion and layman opinion. In the former instance, the question of the "ultimate issue rule" is scrutinized. With respect to the hearsay rule, following the general introduction, a number of exceptions to the rule under Canadian evidence law will be displayed. By reason of the limited length of this thesis and the countless exception of the hearsay rule, only will those exceptions which are either recently developed or frequently dealt with in practice will be discussed in this chapter. On the Chinese side, attention is drawn to the rationale lying behind the hearsay rule. In addition, the actual exclusions of hearsay evidence in practice handled by Chinese courts is examined.

After gaining a general knowledge of the two systems as to opinion and hearsay evidence, a comparative observation is followed. Similarities and differences between the two systems are to be pointed out. Along this line, the advantages and weaknesses of each style are highlighted. Founded on these analysis, recommendations for the reform of both the opinion and hearsay rule in the two countries are advanced by taking each other's advantages into consideration. The focus is, in Canada, on the change of the style of appointment of experts. In China, the reform aims at preventing the adoption of expert opinion at face value, and preventing the trend of finding the accused guilty. With respect to the hearsay rule, suggestions are made to trim and simplify the complex framework of Canadian hearsay evidence; and on the removal of the obscurity and roughness in the Chinese hearsay rule.

Finally, the conclusion of the thesis will sum up the comparative discussions presented in the preceding chapters by highlighting the contrasts and similarities between the Canadian evidentiary style and its Chinese counterpart. The conclusion also deals with the trend in which the two styles are approaching towards one another. Moreover, suggestions for the improvement of both systems are advanced. Finally, I shall argue that the level of evidentiary barriers in the two countries is in fact not the conclusive yardstick measuring the actual success in attaining the discovery of objective truth.

CHAPTER I

MODELS OF ADMINISTRATION OF CRIMINAL JUSTICE IN CANADA AND CHINA

Rules in relation to witnesses are part of that body of law known as evidence which governs the evidentiary process in a fact-finding mechanism. The law of evidence is profoundly influenced by the choice of different trial modes, which in turn, are grounded in different models of criminal justice. In an adversarial model, where the parties have the primary responsibility to develop their respective cases, there are more evidentiary rules. In an inquisitorial model where the judge controls the proof-taking, rules of evidence are relatively simpler and less restrictive. Hence, in any discussion as to the law of witnesses in Canada and China, it is important to understand the administration of criminal justice in each country. Understanding the choice of model, which influences the evidentiary rules, requires an understanding of historical, socio-cultural and ideological forces.

CANADA

With its common law background, Canadian criminal justice is governed by the adversarial process which is characterized by the following:

a) the presence of a neutral trier of fact - a judge or judge and jury. The right to a fair and impartial tribunal is guaranteed by the Constitution,[1] meaning that there must be an appearance of independence requiring security of tenure, financial security, and institutional independence.[2]

Where a case is tried before a jury, the jury decides the relevant fact underlying the verdict, while the judge delivers the sentence.

b) the presentation of evidence is in the hands of the parties, which assumes that each is represented by counsel.

A. Jury Trial

Introduced by William the Conqueror (1066), the jury was incorporated into the Anglo-Saxon trial by ordeal and trial by compurgation and the Anglo-Norman trial by battle.[3] A group of swearers, selected by the public officer, were called on to "present" or accuse persons of crimes committed in the neighbourhood so that they might be brought to trial by the ordeal for judgement of guilt or innocence. When the ordeal was abolished in 1215,[4] the jury became the body determining the ultimate question of guilt.

---

[1] S. 11(d) of the *Canadian Charter and Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B of the *Canada Act* 1982 (U.K.), 1982, c.11 [hereinafter *Charter*].

[2] *R.* v. *Valente* (1985), 23 C.C.C. (3d) 193 (S.C.C.); *R.* v. *Genereux* (1992), 70 C.C.C. (3d) 193 (S.C.C.).

[3] Ordeal - an accused could justify his innocence by carrying hot iron, sitting in boiling water, and so forth. If he survived from these tests, it was believed that God said he was innocent.

Compurgation - a defendant could call eleven of his neighbours to swear to their belief in his innocence.

J.B.Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Boston: Little, Brown, 1898), c.1.

[4] The ordeal trial was abolished trough the Fourth Lateran Council in 1215. Thayer, *ibid.* at 36-39.

In time, barbarism and magic were eliminated.[5] Trial by jury became the chief method of trial both in criminal and civil spheres. Over the years the character of the jurors changed: at first they themselves were witnesses and decided the case based on their own knowledge as to the facts of the dispute or on the basis of local rumour. Accordingly, jurors were liable for perjury if a true verdict was not returned.[6] Although the parties were permitted to state their assertion of the case, and later they secured the privilege of presenting additional information through witnesses, testimony of witnesses was hardly used in the courts. It was not until the sixteenth century that the employment of witnesses' evidence became a common practice.[7] The jury came to rely more and more upon what the parties presented in the open court and less and less upon their own knowledge about the case. At the turn of the seventeenth century, "most commonly juries are led by deposition of witnesses."[8] By the middle of the eighteenth century it had became established that the jury must base its verdict solely upon the evidence produced by the adversaries in open court.[9] Accordingly, the jury was freed from criminal sanction flowing from a verdict that was contrary to the evidence.[10] Thus, the modern jury is the passive observer of the presentation of the case, which is required to excercise its rational process based upon the evidence furnished by the parties.

---

[5] Compurgation fell into disrepute in criminal cases by the *Assize of Clarendon* (1166); battle trial came to its disuse in the thirteenth century.

[6] A case of 15 Edw. I cited by C.L.Wells, "The Origin of the Petty Jury" (1900) 27 L. Q. Rev. 347 at 350; *The Eyre of Kent* (S.S.) v. 1 at 153. Also see B.Kaplan, "Trial by Jury" in H.J.Berman, ed., *Talks on American Law* rev. ed. (Washington: Voice of America, 1972) 51 at 55.

[7] 1562-1563 (U.K.), 5 Elizabeth c.9, s.12. For the details of this trace, see Thayer, *supra*, n. 3 at 123-136; W.W.Holdsworth, *History of English Common Law*, vol. 1, 5th ed. (London: Methuen, 1956) at 183-185.

[8] Coke, *Third Institution* at 163 (ed. of 1817).

[9] Wigmore, *Evidence* 2d ed. (1923), s. 1364.

At jury trials, the jury and the judge carry out distinct functions: the jury decides which version of the disputed evidence to accept, and the judge delivers the sentence. Before the jury's deliberation, it is the judge's duty to *fairly* summarize theories of the Crown and defence, and to summarize supporting evidence with respect to each and set out the applicable law.[11] The reason for this is that jurors, chosen from the general population at random, are not trained in law and, accordingly, they are inexperienced in picking out relevant evidence and assessing conflicting testimony.[12] Therefore, they need the judge's help in reducing the case to its essentials. This is the basis upon which the exclusionary rules of probative policy, the chief rule of evidence, have developed at common law.

In *Wright* v. *Tatham*[13], Lord Coleridge called it a "fallacy" to believe "that whatever is morally convincing and whatever reasonable beings would form their judgements and act upon, may be submitted to a jury." It is the judge's image of the frailty of the jury's mind structure that determines the evidence rules and thereby the mode and scope of the presentation of evidence, and the result of a case may depend on the judge's estimate of the functioning of the jury's mind.[14] As summed up by Wigmore:

---

[10] *Bushell's Case* (1670), 89 E.R. 2 (U.K.K.B.) at 14-152.

[11] *R.* v. *Lorentz-Aflafo* (1992), 69 C.C.C. (3d) 230 (Que. C. A.).

[12] G.Williams, *The Proof of Guilt* (London: Stevens & Sons, 1955) at 207-214.

[13] 5 Clark & F. 670, 690 (H.L. 1838).

> Those rules are aimed at guarding the jury from the overweening effect of certain kinds of evidence. The whole fabric is kept together by that purpose. The rules are supposed to enshrine that purpose.[15]

B. Party-Presentation

The essence of the adversary process is that the conduct of a case is left in the hands of the parties. The parties have the right and the exclusive responsibility to choose the manner in which they will go forward with their case and the proof they will present to support it. The judge plays a neutral role to ensure that each side receives a full and fair opportunity to present the evidence and argue the case.

To successfully conduct their case, each party needs the assistance of counsel to search out the favourable evidence and to attack the adverse facts presented by the opposite side. Therefore, the pattern of party-presentation assumes that each party has equal representation. Here the right of the accused to counsel deserves peculiar attention. In criminal cases the public prosecutor, representing the state, has far superior facilities for assessment and collection of evidence than those of the ordinary defendant. Thus, to ensure the accused's right to present a full answer and defence has become a fundamental principle of criminal justice in Canada[16] and is enshrined in the *Charter* (ss. 7 and 11).

---

[14] K.Kunert, "Some Observations on the Origin and Structure of Evidence Rules under the Common Law System and the Civil Law System of 'Free Proof' in the German Code of Criminal Procedure" (1966-1967) 16 Buff. L. Rev. 122 at 128-143.

[15] 1 Wigmore, *Evidence*, 3d ed. (1940) s.8c at 250.

[16] *R.* v. *Seaboyer* (1992), 66 C.C.C. (3d) 321 (S.C.C.).

The necessity of defence counsel was finely expressed by Stephen:

> To defence a prisoner efficiently is a task which makes considerable demands on the readiness, presence of mind, and facility of comprehension of a men trained to process and use those faculties. That an uneducated man, whose life is at stake, and who has no warning of what is to be said against him, should do himself justice on such an occasion is a moral impossibility.[17]

To conduct a fair trial through party-presentation, it is essential that the accused have, at his side, a skilled lawyer who is pledged to see that the accused's rights are protected. When the matter comes for final trial in court, the only participation accorded to the accused in that trial is the opportunity to present proof and reasoned argument. This opportunity cannot be meaningful unless the accused is represented by a counsel trained in law. If the accused is denied such a right, the adversary system is impaired.

A brief review of the evolution of the right to counsel is helpful in order to appreciate its importance in the adversarial process. Before the 17th century, the accused in a felony case occupied a very disadvantaged position in criminal process. Witnesses called by the accused (allowed after 1640) were not allowed to testify under oath; hearsay and evidence of his bad character were admitted to prove his guilt, and the witnesses against him were often perjured.[18] And the punishment for felony was extremely severe.[19]

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[17] J.F.Stephen, *A History of the Criminal Law of England*, vol.1 (London: Macilhan, 1898) c.11.

[18] Two systems were employed by the English courts before the eighteenth century. One is the crown-witness system: if an accused testified against his accomplice, he could be offered immunity from prosecution. To save his life, an accused was prepared to blame anyone, which could result in the conviction of other innocent accused.

Another system was to pay persons accusing and prosecuting certain classes of criminals. This led to a number of false accusations in which innocent accused were sentenced to death.

M.R.Bloos, The Crown Prosecutor in Alberta: An Unfinished Hybrid (LL.M. Thesis, University of Alberta, 1987) [unpublished] c.3; J.F.Langbein, "Shaping the Eighteenth-Century Criminal Trial: A View From the Ryder Sources" (1983) 50 U. of Chi. L. Rev. 1 at 106-110.

In such a harsh situation, the accused charged with a felony had no right to have counsel for his defence. A defendant was expected to cope unaided with the legally trained counsel for the Crown. The unfairness of trials to the accused stirred public resentment. Consequently, by the 17th century defence lawyers were allowed to help the accused in felony cases.[20] Yet the counsel could not address the jury. It was not until 1836 that a full right to have counsel was eventually granted to the accused.[21]

The price paid by the common law for struggling on behave of individual liberty against the state explains the reason why the right for counsel is so significant in an adversary system that nobody can afford to ignore it.

Party-presentation must be done through the procedure of examination-in-chief and cross-examination. By direct examination the parties present all evidence favourable to their case; by cross-examination they critically test the adverse evidence presented to them by the opposite side. Decided by this question-and-answer pattern, the common law has developed numerous evidence rules to ensure that the parties will be given opportunity to conduct their case as effectively as possible. Therefore, it is not surprising that the adversary system, with its use of the jury trial and party-presentation, produces a complex body of law as to evidence.

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[19] For instance, the sanction for grand larceny committed by the first offenders was the transportation to the colonial overseas for indentured service for a term of seven years. Felons of treason, robbery were sentenced to death.

J.F.Langbein, "The Historical Origins of the Sanction of Imprisonment for Serious Crime" (1976) 5 Journal of Legal Studies 35; Langbein, *ibid.* at 36-41.

[20] *Treason Act*, 7 & 8 William 3 c.3, s.1 (1696).

[21] 6 & 7 William IV. c.114.

C. Judge As Neutral Umpire

In accordance with the parties' control over their case, the judge presiding at a criminal trial remains an essentially passive listener, taking in the evidence and arguments presented during the process phase. His or her role is limited to directing proceedings, ruling on points of law, such as the admissibility of evidence, and if sitting without a jury, to making the final decision on the facts.[22]

By being neutral, the judge is able to hold a balance between the contending parties and to do justice in accordance with the law faithfully. To take part in the evidentiary process may raise the danger of bias and partiality.[23] As stated by Lord Greene M.R. as follows:

> (By taking part in the dispute) he (the judge)... descends into the arena and is liable to have his vision clouded by the dust of conflict.[24]

CHINA

Administration of criminal justice in China bears the imprint of the Western European and the Soviet system. The direct influence of the Continental inquisitorial system stemmed from the European appearance in China during the 19th-20th centuries.[25] Indirectly, such impact came from the large adoption of the Soviet socialist law tradition[26] which, in turn, is impacted by European civil law.[27]

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[22] M.Ploscowe, "The Development of Present-Day Criminal Procedure in Europe and America" (1935) 48 Harv. L. Rev. 433.

[23] N.Brooks, "The Judge and the Adversary System" in A.M.Linden, ed., *The Canadian Judiciary* (Toronto: Osgoode Hall Law School, 1976) 89 at 114-116.

[24] *Yuill* v. *Yuill* (1945), 1 All E.R. 183 (U.K.C.A.) p.15 at 20.

The main characteristics of the inquisitorial system are the non-jury trial, and the judge's thoroughly active role in proceedings for truth-finding.

A. The Role of Lay Judges

The participation of lay judges in the Chinese criminal process is mandated by the principle of collegiality of Chinese trials. With the exception of single judge sitting at the trials of minor cases,[28] appeal trials and the supervision trials,[29] all other criminal courts in China are composed of professional and lay judges.

However, Chinese lay judges play a very different role from that of the common law jury. The law requires lay judges to participate on an equal footing with professional judges in analyzing the available evidence.[30] They are supposed to rule independently both on the question of guilt and the sentence, and any pressure from the professional judge is improper. Their verdict prevails if they outvote the presiding judge with whom they disagree.[31] Therefore, with the lay judge acting as the judge of both fact and law, Chinese criminal proceedings bear little similarities to the jury trial as operates in the Canadian criminal justice system.

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[25] D.A.Donovan, "The Structure of the Chinese Criminal Justice System: A Comparative Perspective" (1987) 21 U. S. F. L. Rev. 229 at 231.

[26] H.J.Berman, *et al*, "Comparison of the Chinese and Soviet Codes of Criminal Law and Criminal Procedure" (1982) 73 J. of Crim. L. & Criminology 238; Donovan, *ibid*.

[27] W.Butler, *Soviet Law*, 2d ed. (London: Butterworths, 1988), c.2; E.L.Johuson, *An Introduction of the Soviet Law* (London: Methuen, 1969) cc. 1,2; C.Osakwe, "Modern Soviet Criminal Procedure: A Critical Analysis" (1983) 57 Tul. L. Rev. 439 at 444, 447-449.

[28] *Criminal Procedure Code of the People's Republic of China*, trans. Chin Kim in *The American Series of Foreign Penal Codes* v. 026 (London: Sweet & Maxwell, 1985) [hereinafter *CPC*] 33, Art. 105; *Organic Law of the People's Courts in the People's Republic of China*, trans. Chin Kim in *The American Series of Foreign Penal Codes* v. 026 (London: Sweet & Maxwell, 1985) 84 [hereinafter *OLPC*], Arts. 9,10.

[29] *Ibid*.

[30] *CPC*, Art. 105.

Where a case is tried by a collegial bench, there is no need for the professionals to instruct their lay colleagues about the quantum of proof in advance of actual deliberation. Nor is advance information needed in how to handle possible factual doubts. If such doubts arise, the professional judge will discuss them together with the lay judges during their deliberation. Therefore, it is obvious that the absence of a jury in China alleviates the need for many formal rules of evidence. No rules exclude certain types of proof because of possible improper influence on the lay judges. For instance, hearsay and character evidence are permitted so long as the judges regard them as of some relevance to the case.

It is to be noted that the efficiency of trials participated in by lay judges is actually impaired in China by virtue of some practical difficulties. To reach sound verdicts requires the lay judge to possess some degree of legal knowledge. However, public legal education did not emerge in China until the 1980's. Hence it is problematic to find suitable lay tiers to fulfil the function of rendering verdicts.[32] Because the Chinese lay judges rarely take an active part in the conduct of the trial, their general tendency is to defer to the law-trained judge to act on behalf of the entire court.[33] Thus, in 1983 the *OLPC* was amended to provide the option doing away with lay judges altogether and proceeding with a bench composed solely of a law-trained judge in some trials of first instance.[34]

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[31] *CPC*, Art. 106.

[32] Zhang Zhi Pei, *et al*, *Textbook on Chinese Criminal Procedure* (Beijing: Masses Press, 1987) at 109.

B. Non-Party-Presentation

Unlike the Canadian adversarial process, a criminal trial in China is actively conducted and controlled by the judge.[35] By taking initiative to inquire into the truth, the Chinese judge leaves much less room, as compared with a Canadian judge, to the parties for examination-in-chief and cross-examination. Therefore, party-presentation is not a feature of the Chinese criminal justice. The result of the judge's active role is that counsel appears to act with subdued adversarial zeal.[36] To allow the examination of the witnesses and introduction of evidence to be placed in the hands of the attorneys has been thought to be incompatible with the chief function of the judge, which is to elicit the truth and not merely to decide which side has presented better evidence.[37] For this reason it is not surprising that most continental countries, although acknowledging the vital importance of assuring the accused's right to counsel,[38] allot to defence lawyers a rather limited role. Generally, the counsel's participation is confined to posing supplementary questions and introducing pleadings before the close of the trial.[39]

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[33] *Ibid*.

[34] *Decision of the Standing Committee of the National People's Congress Regarding the Revision of the Organic Law of the People's Curt of the People's Republic of China* (Sep.2, 1983) (amending Article 10 of the *OLPC*) in *The Laws of the People's Republic of China (1983-1986)* (Beijing: Foreign Languages Press, 1987) at 37-38.

[35] *CPC*, Part III, cc. 1,2.

[36] W.Zeidler, "Evaluation of the Adversary System: As Comparison, Some Remarks on the Investigatory System of Procedure" (1981) 55 The Australia Law Journal 390 at 394-396.

[37] E.J.Cohn, "Law of Civil Procedure" in E.J.Cohn, *et al*, ed., *Manual of German Law*, rev. ed (London: The British Institute of International and Comparative Law, 1971) 162 at 174.

It is important to bear in mind that the right to counsel is more constrained in China than in the Continental civil law jurisdictions and in the former Soviet Union. Counsel is allowed to the accused at the initiation of formal accusatory proceedings in Western Europe[40] as well as in the Soviet Union,[41] but in China such a right is not accorded to the defendant at the pretrial stage. As stipulated by Article 110 of the *CCP*, defence counsel apparently becomes involved in a case only after the court has decided to "open the court session and adjudicate the case." Moreover, even this right of the accused at the trial stage is still somewhat restrained because he (she) is not allowed to conduct a lawyer until seven days before the convening of the court.[42] Under such limitations, Chinese lawyers have even more difficulty playing a vigorous and effective role for their clients at a trial.

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[38] *CPC*, Arts. 8, 26-30.

[39] For instance, in German, see H.Jescheck, "Principles of German Criminal Procedure in Comparison with American Law" (1970) 56 Va. L. Rev. 239 at 248. Also in China, *CPC*, Arts. 114,115,117,118.

[40] R.B.Schlesinger, "Comparative Criminal Procedure, A Plea for Utilizing Foreign Experience" (1966) 26 Buff. L. Rev. 361 at 368. Counsel is often afforded at an even earlier stage. During the pretrial interrogation, the accused is asked the questions "in the presence of his counsel." Jescheck, *ibid.* at 365.

[41] In the Soviet Union, defence counsel is not permitted until after the accused is presented with the results of the completed preliminary investigation. However, in certain types of situation the counsel may involve in the preliminary investigation. *The Code of Criminal Procedure of the RSFSR* (1960, as amended to 1965) trans. H.Berman & J.Spindler, *Soviet Criminal Law and Procedure, the RSFSR Codes*, 2d ed. (Cambridge: Harvard University Press, 1972), Arts. 46,47.

[42] *CPC*, Art.110.

In practice, the passive role of Chinese defence lawyers largely reflects the fact that, in most criminal trials, defence participation orients toward extenuation and mitigation of guilt rather than toward the establishment of innocence.[43] Although allowed to present their own evidence and challenge the questions of the prosecution,[44] Chinese defence counsel seldom perform these functions.[45]

The passive role played by Chinese counsel may be partly due to China's lack of lawyers,[46] or may reflect the traditional Chinese aversion to lawyers,[47] or may be due to the Maoist hostility to "expertise".[48] Another influential factor is that the approach of Chinese lawyers is determined from a socialist perspective. The law clearly indicates that "lawyers are workers of the state",[49] who must proceed from a "proletarian stand" in their work.[50] Their position can neither be described as the prosecution's antagonist nor as that of the defendant's hired gun. Rather, their task is to "protect the interests of the state and the collectives as well as the legitimate rights and interests of citizens",[51] and "to be loyal to the cause of socialism and the interests of the people".[52] Therefore, "proletarian lawyers" should not act like "bourgeois lawyers" who are willing to manipulate facts and bend the law to win a case and help an accused escape criminal responsibility.[53] Given the theory of the loyalty to the state, the minimal role of Chinese lawyers is therefore not a surprise.

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[43] S.Leng, "Criminal Justice in Post-Mao China: Some Preliminary Observations" (1982) 73 J. of Crim. L. & Criminology 204 at 220-221.

[44] *CPC*, Arts. 114,115,117,118,129,139,141.

[45] Butterfield, "Revenge Seems to Outweigh Justice at Chinese Trial", *N.Y.Times*, Dec.6, 1980 at 2; Rodenick, "Gang of Four: Baffling Trial in China", AP, Dec. 6, 1989.

[46] S.Leng & H.Chiu, *Criminal Justice in Post-Mao China* (Albany: State University of New York Press, 1985) at 72-76.

[47] During the years when China was experimenting with the lawyer system, many people regard the presence of a lawyer at a criminal trial as troublemaker and even traitorous. This hostile attitude appears to be persisting in China today. S.Leng, *Justice in Communist China* (Oceana: Dobbs Ferry, 1967) at 144.

> For instance, it was stated by a Beijing radio commentator:
> In some places some comrades still do not quite understand the meaning and role of lawyers. Therefore, they take a rather strong dislike to defence lawyers, and ... even openly prevent lawyers from performing their duties. All this is very wrong.
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> *Daily Report: PRC*, Sept. 24, 1980 (Foreign Broadcast Information Service) at L14.

[48] V. Li, *Law Without Lawyers* (Calorado: Westview Press, 1978) at 23-31.

[49] *The Provisional Regulations on Lawyers of the People's Republic of China* tans., Chin Kim in *The American Series of Foreign Penal Codes* v. 026 (London: Sweet & Maxwell, 1985) 105 [hereinafter *PRL*], Art.1.

However, it is to be noted that the restriction on counsel's functions in China has raised a strong call for reform. Some Chinese jurists have urged eagerly that the defence counsel should participate at pretrial stage, or that the time given to a lawyer to prepare for defence before the pending trial should be extended.[54]

Logically, non-party-presentation requires little need for examination-in-chief and cross-examination. Therefore, the complexity of evidence rules which guide the conduct of such process does not exist in China.

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[50] *China's Daily* (29 August 1980) 4, in which China's First Vice-Minister of Justice spoke of the difference between Chinese and Western lawyers.

[51] *Ibid*.

[52] *PRL*, Art.3.

[53] T.Gelatt, "Resurrecting China's Legal Institutions", Asian Wall Street Journal, March 29, 1980 at 4.

[54] Chen Guang Zhong, "The Study on Chinese Procedure Law in the Past Forty Years" (1989) 4 Journal of University of Chinese Politics and Law 5 at 12-13; H.Y.Zhou, "Several Areas of Chinese Procedure Law Need to be Improved" (1989) 1 Legal Study and Research 27 at 30.

C. Judge as the Searcher of the Truth

In contrast to the performance of judge at Canadian criminal trials, the Chinese judge is responsible for preparation and conduct of the trials. The root of this feature can be found in ancient Chinese judiciary system. In traditional China, Confucianism was the moral and social guide of people's life and conducts. According to its principles, order and its values, rather than individuals rights of any sort, were to be protected above all else.[55] Therefore, the emperor was regarded as the representative of the will of his people in the country. He took the active control over the handling of criminal cases from the investigation to the delivery of sentence. Accordingly, at local level, justice was administered by the county magistrate. He performed the combined functions of investigator, prosecutor, defender and jury.[56]

It is therefore not surprising that, in the 19th-20th centuries when the western countries made their appearance in China, the inquisitorial system in which the judge dominates the trial process, was found favourable to Chinese judicial trials. When the communist party took power in 1949, the active role of the judges at trial is thought to best accord with the philosophy of state trust and socialist collectivism, therefore, it remains one of the main features of the modern Chinese inquisitorial system.

In Chinese criminal process, it is the judge's duty to ferret out the facts rather than to wait for the truth to emerge from the contentions of the opposing parties. The parties are on hand to see that their interests are properly handled. Therefore, judges are required to collect evidence,[57] on their own initiative, including calling all witnesses and experts and interrogating them.[58] Judges also determine the sequence of the appearance of these persons.[59] Although the parties are allowed to ask supplementary questions and, present their own evidence, these actions are subject to the permission of the judge.[60]

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[55] J. Meskill, ed., *An Introduction to Chinese Civilization* (New York: Columbia University Press, 1973) at 570-571.

[56] *Ibid.* at 571.

In the conduct of their examination of evidence, judges will take every conceivable step calculated to assure the truthworthiness of the evidence offered before the court. Judges will then frame their questions so as to uncover the weaknesses and inconsistencies of the evidence. In a sense, such work of the judge includes both the task of the examiner-in-chief and of the cross-examiner. When judges have completed their work, there will be little need for cross-examination. After the questioning by the judge, neither the absence of cross-examination nor of the oath affect the value of evidence in Chinese courts.[61]

It is therefore clear that, in Chinese criminal process, judges, lay or professional, are relied on to assess credibility properly and to reach the truth.[62] Exclusionary rules of probative evidence are not considered to be a central problem connected with the function of the judge to freely evaluate all evidence put before the court. In other words, the question of admissibility of evidence, which is a major concern of a Canadian judge, is largely ignored in Chinese courts. Rather, by leaving this concern to the judge's discretion, the permission for use of evidence is a consideration of relevance. Any material, as long as it is thought related to the case by the judge, is admissible. This is another indispensable reason underlying the lack of evidence rules in Chinese criminal trials.

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[57] *CPC*, Art. 32.

[58] *CPC*, Arts. 114,115,116.

[59] *CPC*, Arts. 115,116.

[60] *CPC*, Arts, 114,115,117.

[61] This analysis is inspired by the fine work of H.A. Hammelmann in "Hearsay Evidence, A Comparison" (1951) 67 L. Q. Rev. 67 at 79.

[62] M.Damaska, "Evidentiary Barrier to Conviction and Two Models of Criminal Procedure: A Comparative Study" (1972-1973) 121 U. of Pa. L. Rev. 506 at 514-515. Although dealing with the Continental legal tradition, the idea on the subject in question is applicable to the Chinese criminal justice, which is a variant of the civil law family.

A COMPARATIVE VISION

A. Ideological Perspectives

Political and economic theory has a profound influence on the choice of judicial process. It has been pointed out that:

> If you believe in the Anglo-Saxon common law tradition, that the individual is the important unit of our society, and the state exists to serve him, then it seems that the adversary system is preferable. If you hold a corporative view of society , that is to say, that the community is the important unit, and that the citizen must be primarily considered as a part of the corporate unit, then it seems you should champion the inquisitorial system.[63]

From this passage, one finds that the Canadian system of adversarial adjudication rests upon notions of individualism and anti-authoritarianism. In the adversary process the parties raise the issues, strive to establish their case with few interference from the judge. This reflects the philosophy of individualism that, in a democracy, the most acceptable type of decision is the result of personal choice. However, since it is impossible to realize personal choice in many situations, the best alternative is a system that assures to those affected by the decision some participation in the process of decision-making.[64] In its emphasis on individual initiative, competition, and minimal intrusion of authority, Canadian criminal adjudication reflects the philosophy of laissez-faire capitalism.[65] Initiative is rightly rewarded, laziness or ignorance penalized.

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[63] "Entre Nous" (1972) 30 Advocate 8.

State distrust is another premise upon which the adversary process rests. Liberal political ideology urges that the central power of government needs to be checked and not to be abused. The adversary system can be viewed as a means of decentralizing power and preventing the abuse of public power.[66] Accordingly, the adversarial system has more procedural and evidentiary barriers, even at the expense of search for truth, for fear of abuse of governmental power. As noted as follows:

> (the law of evidence) was founded in a world of mistrust and suspicion of institutions, it liked nothing better than constant checks and balances...[67]

Also, the jury trial at common law is viewed as an indispensable bulwark of individual freedom against the arbitrary exercise of state power, as expressed by Lord Devlin: "So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives."[68]

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[64] B.Boyer, "Alternatives to Administrative Trial-Type Hearings. For Resolving Complex Scientific, Economic, and Social Issues" (1972) 71 Mich. L. Rev. 111 at 147, n.135.

[65] Neef and Nagel, "The Adversary Nature of the American Legal System from a Historical Perspective" (1974-75) 20 N.Y.L.F. 123 at 162. Also see Brooks, *supra*, n. 23 at 99.

[66] Damaska, *supra*, n.62 at 583.

[67] L.M.Friedman, *A History of American Law* (New York: Simon and Schuster, 1973) at 350.

Civil law has no anti-authoritarian theory. By contrast, the ideological basis of Continental law is state positivism, rather than laissez-faire capitalism.[69] This notion finds strong support in socialist law's emphasis on collectivism, as opposed to the primacy of the individual. According to socialist theory, the interests of the state and the individual are assumed to coincide.[70] As the state power is in the hands of the overwhelming majority of the people, mistrust of those who administer criminal justice would be misplaced.[71] Therefore, although the potential danger of abuse exists, basic trust in public officials is the dominant belief, and the possibility of misuse of powers is not a primary concern in devising procedural arrangement. Guided by this philosophy, the Chinese criminal process is thought to accord best with the inquisitorial system. Under this system, judges, as delegates of the fairness and interest of the state, must be greatly trusted in doing their work for the search of the truth. They are accordingly entrusted to control the trial and to manage the production of evidence.

Consequently, many procedural safeguards and evidence rules, acceptable to the ideology of the adversary process, are deemed to be incompatible with the idea of state trust. With the judge, who is believed to do justice, sitting on the bench, the body of evidence rules of probative policy and other technical rules are viewed by socialist jurists as loopholes and "unnecessary obstacles of pedant legal etiquette."[72]

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[68] P.Devlin, *Trial by Jury*, rev. ed. (London: Methuen, 1966) at 164.

[69] J.Merryman, *The Civil Law Tradition, A Introduction to the Legal Systems of Western Europe and Latin American* (California: Stanford University Press, 1969) at 59-64.

[70] C.Osakwe, "The Four Images of Soviet Law: A Philosophical Analysis of the Soviet Legal System" (1985-86) 21 Tex. Int'l L. J. 1 at 12-15, 20.

[71] Damaska, *supra*, n. 62 at 567-568, n. 146.

The lay element in Chinese inquisitorial procedure is regarded as a popular support to the adminstration of justice. Trust in justice is strengthened when ordinary citizens participate in decision-making.[73] Moreover, cooperation of laymen with the professional judge avoids the one-sided "legal" decisions. Through such connection, the professional judge is viewed as maintaining contact with the general legal beliefs of the public as a whole.[74]

B. Effectiveness of the Two Systems

Argument over which system is better to achieve the objective truth has been long standing. As to the adversarial system, its proponents argue that the self-interested incentive of the parties results in a more thorough investigation of the facts, because the contesting sides try harder to present all evidence and test adverse evidence to establish their case.[75] Second, triers of fact under the adversarial system are more likely to reach a correct conclusion because their passive role avoids the passibility of bias.[76]

However, opponents of the adversarial system argue that the "sporting game" tends more easily to lead to the concealment of the unfavourable evidence by the parties.

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[72] 1 K.Marx & F.Engels, *Sochinenia* (*Collected Works*) 2d ed. (1955) at 157.

[73] Zhang Zhi Pei, *supra*, n. 32 at 108.

[74] *Ibid.* at 113.

[75] Brooks, *supra*, n.24 at 104-116; E.Morgan, *Some Problems of Proof Under the Anglo-American System of Litigation* (New York: Columbia University Press, 1956) at 3.

[76] G.M.Adams, "The Small Claims Court and the Adversary Process, More Problems of Function and Form" (1973) 51 Can. Bar Rev. 583 at 593-599.

The result might be fewer facts for the judge.[77] Damaska further indicates:

> In the conceptual realm of the party contest, it seems perfectly acceptable that a party, perhaps in the right on the merits, 'lose' on a technicality - if he violated the rule regulating the contest. The judgement itself is not so much in the nature of a pronouncement on the true facts of the case; it is, rather, a decision *between* the parties.[78]

The primary supporting view of the inquisitorial model of trial process is that a real "truth search" can be accomplished through a thorough official inquiry by the judge. Because judges elicit exonerating as well as incriminating facts on their own initiative, the danger that the parties hide unfavourable evidence is thereby avoided.[79] Meanwhile, the active control of the process by the judge leads to simpler structures and rules of proceedings, including evidentiary rules, because these technicalities and rules are viewed as barriers in the way of finding the objective truth.[80] Therefore, it is thought that the inquisitorial process is more scientific and effective in finding the substance and certainty of the truth.

Opponents of the inquisitorial system argue that judicial activism may cause judges to become biased in the case, accordingly the accuracy of the truth can not be reached.[81] Moreover, the non-adversary judge, motivated only by official duty, may not be as diligent as the self-interested parties in probing into the truth.[82] Another factor impairing the efficiency of the inquisitorial process is the preclusion of the cross-examination, which is "the only effective way" to test the truth of the presented evidence and to find the real truth.[83]

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[77] P.Brett, "Implications of Science for Law" (1972) 18 McGill L.J. 170 at 186, 187. Also see J.Frank, *Courts on Trial, Myth and Reality in American Justice* (Princeton: Princeton University Press, 1949) at 80.

[78] *Supra*, n. 62 at 581-582.

[79] T.Volkmann-Schluck, "Continental European Criminal Procedures: True or Illusive Model?" (1981) 9 Am. J. Crim. L. 1 at 4-5, 26; Osakwe, *supra*, n.27 at 447-451; Donovan, *supra*, n. 25 at 262.

[80] Damaska, *supra*, n. 62 at 564, 581-583.

[81] Brooks, *supra*, n. 23 at 114-116; E.A.Lind, *et al*, "Discovery and Presentation of Evidence in Adversary and Non-adversary Proceedings" (1973) 71 Mich. L. Rev. 1129.

Notwithstanding the two contesting views, some commentators take the middle position: the objective of both systems is the same search for truth.[84] It has been argued that:

> The difference between German and American procedural law does not lie, therefore, in the high ideals which have been set, but rather in the *methods* chosen to obtain them.[85]

This writer take the position that both systems aim at the same search for truth. However, there are more barriers in the way of achieving this goal in the adversarial system, both procedural and evidentiary, than in the inquisitorial system.

C. Structure of the Body of Evidence Law

Apparently the choice of trial mode affects the construction of evidence law. The relative complexity of Canadian evidence doctrine stems from the jury trial and the proof-taking mode of party-presentation. In short, where the mental capacity of the jury, being inexperienced and once-in-a-life trier, is considered, exclusive rules of probative policy are set up to prevent possible confusion and distraction of the jury. At the same time, the process of examination-in-chief and cross-examination requires evidentiary rules guiding the proper performance and completeness of the conduct.

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[82] Brooks, *supra*, n. 24 at 104, 106; J.Langbein, *Comparative Criminal Procedure: Germany* (St. Paul, MN: West, 1977) at 150-151.

[83] Zeidler, *supra*, n. 36 at 397.

[84] N.N.Weinstock, "Expert Opinion and Reform in Anglo-American, Continental, and Israeli Adjudication" (1986-87) 10 Hastings Int'l & Comp. L. Rev. 9 at 17; Jescheck, *supra*, n. 39 at 240-241.

[85] Jescheck, *supra*, n, 39 at 241.

In contrast, under the Chinese inquisitorial system, the strong and active position of judges reflects an enormous confidence in their ability to be both active and impartial and to give every item of relevant evidence the weight that it deserves. Therefore, there is not much room for the existence of a huge body of evidentiary rules. Especially since the jury trial does not feature the Chinese criminal process, the numerous rules of exclusion for this sake are unnecessary.

CHAPTER II

COMPETENCE AND COMPELLABILITY

A person may not enter the witness's box unless he or she meets the necessary requirements as to competence. Otherwise statements of the person regarding the case are not heard. Therefore, to determine the testimonial competence of a witness may be an important preliminary stage before a court hears the witness's evidence. Both Canada and China recognize certain standards to test the testimonial capacity of witnesses. The chief difference is that the Canadian law has more and stricter rules than the Chinese law. The purpose of this chapter is, by looking at the law as to competency on both sides, to gain an understanding of the main differences between the two systems on this subject. This chapter is also to illustrate the trend that the two systems are, notwithstanding distinctions, moving toward each other.

CANADA

A. Competence

1. Introduction

Early common law evolved a long list of incompetent witnesses, which included non-Christians, parties to an action and their spouses, convicts and persons with a financial interest in the outcome of the proceedings. As the common law matured, this list was shortened.[1] Nowadays, the usual standard of testimonial competency in Canada is the witness's capacity of perceiving, remembering and communicating her recollection to the trier of fact. The ability of communication embraces two aspects: the intellectual ability to understand questions and to give intelligent answers, and the moral appreciation of telling the truth.[2]

According to this test, age, weakness of intellect, mental illness or drunkenness are not grounds of incompetency. It is only if they render the witness unable to observe, recall or communicate the event, or unable to understand the nature of oath and to accept the obligation thereof that they become so. Thus, in *R.* v. *Brasier*,[3] an child under seven years old was sworn to testify. In *R.* v. *Hill*,[4] it was objected that the chief prosecution witness was incompetent due to his lunacy. As said by Wigmore: "the derangement or defect, in order to disqualify, must be such as *substantially negatives trustworthiness* upon the specific subject of the testimony."[5]

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[1] Convicts became competent to testify in 1843 in England; at the same time, persons interested in the outcome of a case became competent witnesses. 6,7, Vic. c. 85.

For a historical review in this respect, see C.Tapper, ed., *Cross on Evidence*, 7th ed. (London: Butterworths, 1990) c.5.

[2] R.Delisle, *Evidence, Principles and Problems* (Toronto: Carswell, 1989) at 209.

[3] (1779), 168 E.R. 202 (C.C.R.).

[4] (1851), 169 E.R. 495 (Crown Cases Reserved). Followed in *R.* v. *Dunning* (1965), Crim. L.R. 372 (C.C.A.).

[5] 2 *Wigmore on Evidence* (3d ed.), s. 492, adopted in *R.* v. *Hawke* (1975), 22 C.C.C. (2d) 19, 27 (Ont. C.A.).

2. Sworn and Unsworn Testimony

1) Oath

a. Introduction

In Canada, subject to certain exceptions (affirmation and unsworn testimony), every person who gives evidence before a court is obliged to take an oath.[6] Refusal to do so is contempt of court for which the witness may be imprisoned.[7]

The rule requiring an oath stemmed from Monotheistic religions regarding God as responding to the magic of oath. It was intended as one guarantor of truth,[8] because a belief in a Supreme Being who would deliver divine punishment for the falsehood would bind witness's the conscience.[9]

The early common law strictly required oath as a prerequisite to giving testimony.[10] In its original form, the oath had to be taken on the Christian gospel. This excluded the competence of those who were heathens, those who were atheists, and those who were incapable of appreciating the nature and consequences of the oath due to youth or intellectual disability.

The exclusionary category of "heathens" was substantially modified by the decision in *Omychund* v. *Barker*[11] which held that a deposition sworn to by a Gentoo should be accepted. In the court's view, oaths were not a Christian invention but were a universal requirement based upon a universal belief in a governor or creator of the world.

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[6] *Canada Evidence Act*, R.S.C. 1985, c. C-5 [hereinafter *CEA*], s. 13.

[7] *The Criminal Code*, R.S.C. 1985, c. C-46 [hereinafter *CC*], s. 545.

[8] The second guarantor is cross-examination.

[9] *Oath Act* (U.K.), 1888, c.46.

[10] *Wright* v. *Tatham* (1837), 112 E.R. 488.

Nevertheless, the orthodox religious component of oath still disqualified a large segment of the population: those who were atheists; those whose religions forbade the taking of an oath; and those who lacked intellectual appreciation of the concept. By the twentieth century the rules respecting oath had been codified. The trend of modern legislation has been two-fold: first, to encapsulate the common law rules respecting children and the mentally disabled in statutory form; second, to remove from the list of disabled witnesses those persons whose religion forbids an oath and those who were unwilling to take an oath.

b. Requirements of the Oath

Originally, the prerequisite to an oath was a religious one, in which the understanding of the nature and the consequence of an oath was required.[12] Along with the increase of atheism, gnosticism and ignorance of religious doctrine today, the religious component of oaths has diminished.

In *R.* v. *Bannerman*,[13] it was held that taking an oath should require a witness to understand a moral obligation to speak the truth. This was agreed to and reaffirmed in *Reference re R.* v. *Truscott*.[14]

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[11] (1744), 26 E.R. 15.

[12] *Ibid.* at 31.

[13] (1966), 55 W.W.R. 257, aff'd 57 W.W.R. 736.

In *R.* v. *Fletcher*,[15] it was ruled that no inquiry should be made as to the belief of God or a Supreme Being when deciding if the child witness understands the nature of an oath. MacKinnon J.A. said as follows:

> It is recognized that as society changed over the years the oath for many has lost its spiritual and religious significance. Those adults to whom the sanctity of the oath has lost its religious meaning, none the less have a sense of moral obligation to tell the truth on taking an oath and feel their conscience bound by it. That is the nature of the oath for many adult witnesses today.[16]

The secular reasoning of oaths was accepted by the Alberta Court of Appeal.[17] Recently in *R.* v. *Khan*,[18] the Supreme Court of Canada has confirmed this secular concept of binding conscience. What is required is "an appreciation of the significance of testifying in court under oath."[19]

More recently, the courts have endeavoured to sharpen the distinction by requiring that the witness understand the solemnity of the occasion, and that there is an added responsibility to tell the truth over and above the duty to tell the truth which is an ordinary duty of normal social conduct.[20]

The secularization of the meaning of an oath raises a problem: how to distinguish

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[14] (1967), S.C.R. 309 at 368.

[15] (1983), 1 C.C.C. (3d) 370 (Ont. C.A.).

[16] *Ibid.* at 377.

[17] *R.* v. *Connors* (1986), 71 A.R. 78 (C.A.).

[18] (1991), 59 C.C.C. (3d) 92.

[19] *Ibid.* at 98.

[20] *R.* v. *Khan* (1988), 42 C.C.C. (3d) 197 (Ont.C.A.).

"the moral obligation to tell the truth" from "promising to tell the truth" when unsworn testimony under s. 16(3) of the *CEA* is given. In *R.* v. *Budin*,[21] the Ontario Court of Appeal ruled that "a moral obligation to tell the truth is implicit in such belief (of God or another Almighty) and appreciation."[22]

One question also asked is whether any form of taking an oath should be maintained, because some form of oath or affirmation is virtually a universal requirement,[23] however, in most jurisdictions the religious component of oath has substantially diminished. The Canadian Task Force on Uniform Rules of Evidence suggested that the oath be retained as an alternative to affirmation.[24] The recommendation was further predicated upon the view that an oath or affirmation could be one choice for the witness, not requiring or permitting any inquiry into religious beliefs.[25]

2) Affirmation

Affirmation was initially invented to reduce the list of incompetent witnesses, such as Quakers, Separatists and Moravians (for whom the taking of an oath is blasphemous).[26]

In Canada, s. 14 of the *CEA* provides affirmation for a person who objects to take an oath on grounds of conscientious scruples, or for someone who is objected as incompetent to take an oath.

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[21] (1981), 58 C.C.C. (2d) 352, 355.

[22] See also *Horsburgh* v. *R.* (1966), 1 O.R 739, 755 (C.A.); *R.* v. *Dinsmore* (1974), 5 W.W.R. 121.

[23] Law Reform Commission of Ireland, *Report on Oaths and Affirmations* (1990) at 23.

[24] *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (1982) at 234.

[25] *Ibid.* at 239.

[26] *Supra*, n. 23 at 10.

It is unclear whether the *CEA* permits an atheist to affirm.[27] McWilliams states as follows:

> it is unnecessary to explore the religious belief, or lack of it, of the witness, or whether the oath is contrary to his belief; it is sufficient that the witness 'objects on general grounds of conscientious scruples or is objected to as incompetent to take an oath'. Thus where a witness said that to take an oath was against his 'philosophy of life' it was held that he should have been permitted to affirm. But the objection must be made on conscientious scruples.[28]

It is also unclear under the *CEA* that whether a child or mentally disabled witness who is found incapable of taking an oath may be affirmed instead. In *R.* v. *Walsh*,[29] it was held that moral depravity or a disposition to lie does not render a witness incompetent to testify. The term "is objected to as incompetent" does not mean mental incompetency but rather refers to the fact that an oath would not bind conscience. The court further stated:

> As Dean Wigmore has pointed out it is not entirely clear whether when the competence of the witness is in issue on account of insanity the capacity to take an oath requirement was based on the religious belief requirement of the common law, or whether it related to the moral qualification to testify which is especially likely to be lacking in persons who are insane, and in children. With the dispensation of the religious belief requirement, the latter element is forced into prominence...[30]

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[27] Delisle, *supra*, n. 2 at 221.

[28] P.K.McWilliams, *Canadian Criminal Evidence* (3rd ed.) (Ontario: Canadian Law Book, 19910 c. 34 at 6. See also *R.* v. *Bluske* (1948), 90 C.C.C. 203 (Ont.C.A.); *R.* v. *Deakin* (1911), 19 C.C.C. 62 (B.C.C.A.).

[29] (1979), 45 C.C.C. (2d) 199.

[30] *Ibid.* at 205.

It seems that the list of persons who are unable to take an oath has been reduced to the mentally disabled and child witness. Some recent cases have held that, with respect to the mentally disabled witness who is found incapable of being sworn, such a witness can be affirmed provided there is an indication that the witness understands the duty to speak the truth.[31]

Respecting child witnesses, the case law is contradictory. In *R.* v. *Budin*,[32] it was ruled that the right to affirm does not extend to a child of tender years. By contrast, in *R.* v. *Connors*,[33] the Alberta Court of Appeal ruled that a child who understood the moral obligation to tell the truth could be affirmed.

3) Unsworn Testimony

Under s. 16 of the *CEA*, if a proposed witness shows her ability to communicate, she may be permitted to give evidence upon a promise to tell the truth. This permits the reception of unsworn evidence from children under fourteen years of age, and from the elderly or mentally disabled.

Before admitting unsworn testimony, an inquiry should be conducted by the presiding judge to test whether the witness understands the nature of an oath or the solemnity of an affirmation. If so, the witness should give evidence under oath or affirmation. If not, a further inquiry should be made to determine if the witness is able to communicate. Here the ability to communicate means, as McWilliams indicates, the capacity to observe and comprehend what was being observed.[34] He criticizes that the word "communicate" in the *CEA* limits witnesses' power of sensing, recalling and communicating to only their ability to communicate.[35]

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[31] *R.* v. *Dawson* (1968), 4 C.C.C. 33 (B.C.C.A.); *R.* v. *Hawke*, *supra*, n.5 at 30; *R.* v. *T.C.D.* (1988), 61 C.R. (3d) 168 (Ont. C.A.).

[32] *Supra*, n. 21 at 352.

[33] *Supra*, n. 17 at 78.

Unsworn testimony of children was not allowed until the 19th century.[36] However, it was suggested that young children ought not to be called unless in exceptional circumstances, because their understanding of oaths and the occurrence of the event was lacking, and therefore their evidence was unreliable.[37] This traditional convention has been nonetheless changed in recent years. In *R.* v. *Z.*,[38] it was said that the removal of the requirement of corroboration by Parliament signalled the "increasing belief that the testimony of young children, when all precautions have been taken, may be just as reliable as that of their elders."[39]

This changed view was adopted in *R.* v. *Khan*, in which the Supreme Court of Canada agreed with the following opinion of Robins, J.A. of the Ontario Court of Appeal:

> Where the declarant is a child of tender years and the alleged event involves a sexual offence, special considerations come into play in determining the admissibility of the child's statement. This is so because young children of the age with which we are concerned here are generally not adept at reasoned

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[34] McWilliams, *supra*, n. 28 at 12.

[35] *Ibid.*

[36] *Criminal Law Amendment Act* 1885, 48 & 49 Vic., c.69, s.4.

[37] *Sanky* v. *R.* (1927), S.C.R. 436 at 439; *R.* v. *Wallwork* (1958), 42 Cr. App. R. 153 at 160-161; *R.* v. *Wright* (1987), 90 Cr. App. R. 91 (C.A.).

[38] (1990), 2 All E.R. 971 (C.A.).

[39] *Ibid.* at 973-974.

> reflection or at fabricating takes of sexual perversion. They, manifestly, are unlikely to use their reflective powers to concoct a deliberate untruth, and particularly one about a sexual act which in all probability is beyond their ken.[40]

The changed view as to reliability of children's testimony has given rise to the policy that children, including young children, can be heard at least on an unsworn basis.

3. Exceptions to General Competence

1) The Accused and Co-accused

At common law a person on trial for an offence was not even competent to give evidence for or against himself; and co-accused on trial for an offence could not be called as witnesses for or against themselves or each other.[41]

By the 19th century, along with the establishment of protection against self-incrimination, the incompetency of an accused to testify was removed.[42] In 1906, it was clearly settled that the accused is competent to testify on his own behalf.[43]

Under s.4(1) of the current *CEA*, the accused is competent to give evidence for the defence, but remains incompetent to testify for the prosecution. Similarly, a defendant is capable of testifying for anyone being tried jointly with him, but is an incompetent witness for the Crown.

Conventionally, when the accused was tried separately, or pleaded guilty, or was acquitted, he became a competent witness for the prosecution.[44] However, in *R.* v. *Zurlo*,[45] the court queried whether, in light of recent decisions of the Supreme Court of Canada,[46] a witness tried separately could be compelled to give evidence against his co-accused to the same offence. It seems now that there is a trend to prevent an anticipated breach of the right to silence by quashing a subpoena issued to an co-accused who is separately tried so as to prevent the prosecution from benefitting from the breach of the right through use of derivative evidence. This trend was reconfirmed by the decision of *R.* v. *A.*,[47] in which the court declined to permit the Crown to call a co-accused upon staying charges against that co-accused.

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[40] *Supra*, n. 20 at 210.

[41] *R.* v. *Connors et al* (1893), 5 C.C.C. 70 (Que. Q.B.); *R.* v. *Blais* (1906), 10 C.C.C. 354 (Ont. C.A.). Also R.D.Noble, "Struggle to Make the Accused Competent in England and in Canada" (1970) 8 Osgoode Hall L.J. 249.

[42] *Canada Evidence Act* 1893 (Can.) c.31.

[43] *Canada Evidence Act*, 1906 (Can.), c. 10, s.1.

2) Spouses

a. General

Early common law did not permit spouses to testify for or against one another.[48] The underlying policy was the concern for falsehood in one interested in the outcome.[49]

In time this rule has been changed. Under S. 4(1) of the *CEA*, the accused's spouse is now a competent witness for the defence, although the spouse is still incompetent for the prosecution except in several situations. The justification is to protect marital harmony,[50] or the "natural repugnance to every fair-minded person to compell a wife or husband to be the means of the other's condemnation."[51]

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[44] *Cross on Evidence*, *supra*, n. 1 at 210; *R.* v. *Crooks* (1982), 2 C.C.C. (3d) 57 (Ont.H.C.J.), aff'd C.C.C. *loc. cit.*

[45] (1990), 57 C.C.C. (3d) 407.

[46] *R.* v. *Hebert* (1990), 57 C.C.C. (3d) 1 (S.C.C.); *R.* v. *Chambers* (1991), 59 C.C.C. (3d) 321 (S.C.C.); *Thomson Newspapers Ltd.* v. *Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* (1990), 54 C.C.C. (3d) 417 (S.C.C.).

[47] (1991), 66 C.C.C. (3d) 89 (Alta. Prov. Ct.) 93.

[48] *R.* v. *Bissell* (1882), 1 O.R. 514 (H.C.J.); *Shenton* v. *Tyler* (1939), 1 Ch. 620 (C.A.).

[49] *Cross on Evidence*, *supra*, n. 1 at 222-223; Delisle, *supra*, n.2 at 225.

Spousal incompetency does not survive death or divorce.[52] Once the marriage has been dissolved by divorce, the ex-spouse is competent to testify at the instance of the Crown. The justification is that, after the disappearance of marriage, there is no marital harmony to preserve from the discord generated by the testimony of the former spouse of the accused.

Recently in *R.* v. *Salituro*,[53] the Supreme Court of Canada held that society had no interest in preserving marital harmony when spouses were irreconcilably separated, and it was appropriate to abolish the rule as to spousal incompetency in such circumstance.

A common law wife or husband is a competent and compellable witness for the prosecution.[54]

b. Statutory Exceptions

If a person is charged with an offence enumerated in ss. 4(2), (4) of the *CEA*, the accused's spouse is both competent and compellable to give evidence for the Crown without the consent of the accused.

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[50] *R.* v. *Bailey* (1983), 4 C.C.C. (3d) 21; *R.* v. *Sillars* (1978), 45 C.C.C. (2d) 283.

[51] Wigmore, *Evidence* (MeNaughton rev. 1961) v. 8 at 217, s.2228.

[52] *R.* v. *Marchand* (1980), 55 C.C.C. (2d) 77 (N.S.S.C. App. Div.); *R.* v. *Bailey*, *supra*, n. 50.

[53] (1991), 68 C.C.C. (3d) 289 (S.C.C.).

[54] *R.* v. *Jackson* (1981), 61 C.C.C. (2d) 540 (N.S.S.C.App. Div.); *R.* v. *Duvivier* (1990), 60 C.C.C. (3d) 353 (Gen. Div.).

Note that a spouse was incompetent to testify against the other in cases of child beatings.[55] It was not until 1982 that the *CEA* was amended to provide the competency of spouses in such cases.

c. Common Law Exceptions

S.4(5) of the *CEA* provides:

> (5) Nothing in this section affects a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.

At common law, one spouse is competent to testify against the other in cases of all alleged offence against the person or liberty of the other. These cases involve an offence such as forcible or fraudulent abduction; inveigling into a marriage procured by friends, and so forth.[56]

B. Compellability

The general rule is that, subject to some exceptions, all competent witnesses are compellable to testify.

An accused is both incompetent and incompellable to testify for the Crown. Although competent for the defence, the accused is not compellable to do so. It is the accused's choice whether to enter the witness's box to give evidence in favour of his case.

The co-accused are neither competent nor compellable to testify against each other. When tried separately, or acquitted or pleaded guilty, the accused, according to the present trend, should not be compelled to testify for the Crown for the purpose of preventing the prosecutor from benefitting from derivative evidence.[57]

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[55] However, see *R.* v. *MacPherson* (1980), 52 C.C.C. (2d) 547 (N.S.S.C. App. Div.); *R.* v. *McNamara* (1979), 48 C.C.C. (2d) 201.

[56] *R.* v. *Bissell*, *supra*, n. 48.

At common law, an accused is a competent but not a compellable witness for anyone being tried jointly with him.[58] When acquitted, tried separately or having pleaded guilty, an accused becomes both competent and compellable witness for other co-accused.[59]

As a competent witness for the defence, the spouse of an accused is also compellable to give evidence for the defence.[60]

A spouse of the accused is an incompetent as well as incompellable witness for the Crown. However, under the situations of the statutory exceptions, the spouse becomes both competent and compellable to testify against the accused. In the situations involving the common law exceptions, the traditional view is that compellability does not flow from competency and the spouse is not a compellable witness for the Crown.[61] However, this has been an controversial issue recently.[62] For example, Iacobucci J. stated in *R.* v. *Salituro*:

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[57] Cases cited in *supra*, n. 45, 46,47.

[58] *Cross on Evidence*, *supra*, n. 1 at 211-212.

[59] *R.* v. *Conti* (1973), 58 Cr. App. Rep. 387 (directed acquittal); *R.* v. *Boal* (1965), 1 Q.B. 402 (pleaded guilty).

[60] *R.* v. *Koester* (1986), 70 A.R. 369 (C.A.).

[61] *Hoskyn* v. *Metro Police Commissioner* (1978), 2 All E.R. 136, 154 (H.L.).

[62] *R.* v. *Lonsdale* (1973), 15 C.C.C. (2d) 201 (Alta. S.C. App. Div.); *R.* v. *Curran* (1978), 45 C.C.C. (2d) 365 (Ont. Pro. Ct.).

> However, were it necessary to decide this question (compellability of spouses for the Crown in common law exceptions), the possibility that a competent spouse would be found also to be compellable is a real one,...[63]

CHINA

A. Competence

1. Introduction

1) The Accused and the Victim

It is to be noted at the outset that the accused and the victims are excluded from the definition of witness under Chinese law. They are competent to testify at trial, but their testimony is used as independent evidentiary sources.[64] This is so because of the peculiar nature of their evidence.

As to the accused, the justification is that since the accused is under serious suspicion, his statement ought to be considered with distrust: if guilty, he has an obvious interest in concealing the truth; even if innocent he may have overriding reasons for doing so.[65] Neither fear of punishment for perjury nor moral consideration are likely to incline him to speak the truth, as they do normally in the case of witnesses.[66] For this reason Chinese courts distinguish the evidence of the accused from that of ordinary witnesses.

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[63] *Supra*, n. 53.

[64] *Criminal Procedure Code of the People's Republic of China*, trans., Chin Kim in *The American Series of Foreign Penal Codes*, v. 026 (London: Sweet & Maxwell, 1985) 33 [hereinafter *CPC*], Art. 31. It provides:

> Every fact that proves the true circumstances of a case is evidence. The following six kinds are evidence:
> 1. material evidence and written evidence;
> 2. testimony of witnesses;
> 3. victim's statement;
> 4. accused's statements and explanations;
> 5. conclusions of an expert witness; and
> 6. dossier of inspection and examination.

As to victims, the underlying policy is the following: having experienced a moral, physical or material injury from a crime, victims usually possess more direct knowledge of the facts. However, being the object of the injury, their hatred of the accused leads to the possibility of exaggeration or concealment of the truth.[67] Moreover, according to Article 54 of the *CPC*, victims have the right to file a supplementary civil action in a criminal trial if they have sustained material losses as a result of the accused's commission of the crime. Their interest in the outcome of the case may also affect the trustworthiness of their evidence. For this reason victims are distinguished from the definition of ordinary witnesses, as their evidence deserves cautious assessment. This is similar to the situation of persons with a financial interest in the outcome of the case in the sixteenth century in the U.K..

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[65] For instance, the accused may falsely confess that he committed a crime for the purpose of shielding a friend; or she may make a confession of the commission of a minor crime to provide an alibi for a more serious crime committed elsewhere.

[66] Wang Gang Xiang, *Theory and Practice of Evidence in Criminal Proceedings* (Shanghai: Institution of Shanghai Social Science Press, 1987) at 146-148; Zhang Jie Bo and Liu Mei Fang, "The Statement of the Accused in Criminal Trials" (1990) 5 Wuhan University L. Rev. 55; Min Shan, "The Statements of the Accused Should be Evaluated Accurately" (1982) 1 Research of Law, 19 at 20-21.

[67] Wang Jie Min, "Statements of the Victim" (1984) 6 Theory of Politics and Law 18 at 19; Zhang Qi Fu, "The Procedural Position of the Victim in Criminal Trials and its Meaning in the Theory of Crime" (1986) 6 Law and Practice 7; Zhang Kai Ji, "The Procedural Position of the Victim in Criminal Proceedings and His Procedural Rights" (1986) 6 Law and Practice 33.

2) The General Rule of Competence

Article 37 of the *CPC* provides:

> All persons who know about the circumstances of a case shall have the duty to be witnesses.
> Those who have physical or mental handicaps or those who are too young to distinguish right from wrong or who can not accurately express their own will, shall not be witnesses.

Notice that physical or mental deficiencies do not necessarily render a witness disqualified unless such handicaps negative the witness's capacity of perception, recollection or communication.[68] Similarly, the disqualification of mental immaturity operates only where it hinders a witness's capacity to testify.[69]

According to Article 37 of the *CPC*, there is no disqualification imposed on any relatives by blood or marriage. In other words, parents are not excused from testifying against their children, and vice versa. Spouses of the accused are competent witnesses for or against one another.[70]

Interest in the outcome of a case is not a reason rendering a witnesses incompetent, but only goes to the weight of their evidence. According to the interpretation by the Supreme Court of China, unless otherwise proclaimed by law, any person related to the accused of anyone with a direct personal interest in the outcome of the case because of suffering from a material loss by a crime should give their evidence before the court.[71]

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[68] Wu Yie Ping, "Testimony of Witnesses in Criminal Proceedings" in Zhang Zhi Pei, *et al* eds. *Discussions on Issues of Criminal Proceedings in Theory and in Practice* (Xian: Law Press, 1987) at 79-80.

[69] Zhang Tao, "A Brief Review on Testimony of Children" (1990) 1 Construction of Law 21 at 21-22; Yang Li Xing, "Testimonial Qualification of Young Witnesses" (1986) 6 Law and Practice 30 at 31-32.

[70] Chao Shen Lin, "Testimony in Criminal Proceedings" (1980) 2 Journal of Beijing College of Politics and Law 275 at 277-278.

2. Exception - Co-accused

Without any provision in law relating to a co-accused's competence, this has been a controversial issue in China. Some propose that persons tried jointly are competent witness for or against one another.[72] The justification concerns the ultimate truth of a case: incompetence of co-accused will add to the uncertainty of the truth and thereby the unsettlement and suspension of numerous cases. Especially in cases where no other evidence is available, the utterance of the accused as to the other co-accused's crime becomes the only evidence revealing the truth. If the court disqualifies the co-accused, the fact as to whether persons tried jointly have committed the crime may never be clarified.[73]

For this reason, it is submitted that the interpretation of Article 31 of the *CPC* should be as follows: although the accused is defined differently from ordinary witnesses, he is nonetheless a competent witness for or against other co-accused so far as his testimony about other's crime or innocence is concerned.[74]

The contrary view held by other commentators is that co-accused are incompetent to testify for or against each other.[75] Their justification is based on Article 35 of the *CPC*. Under this Article, it is required that confession alone, unlike at common law it is conclusive, cannot lead to the conviction of the defendant. That conclusion can be only reached when the confession is confirmed by other evidence.

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[71] "The Reply of the Supreme Court as to Whether Persons Having Interest to the Result of the Case is Competent to Testify" (6/22/1957) in *The Law Book of the People's Republic of China*, Wang Hue An *et al* ed. (Jiling: Jiling People's Press, 1989) at 250.

[72] Chen Jie Guo and Fang Chen Zhi, "Testimony of Co-accused Should be Evidence Used to Clarify the Truth" (1983) 3 Research of Law 41; Ke Ge Zhuang, "Classification and Credibility of Testimony of the Accused" (1988) 5 Law and Politics 37 at 39.

[73] Chen Jie Guo, *ibid.* at 41-42.

[74] *Ibid.* Ke Ge Zhuang, *supra*, n. 72 at 39.

According to this principle, it is contended that, in cases of a jointly committed crime, if the only evidence available is the statement of co-accused, the presiding judge should not render a conviction by solely relying on such evidence. Given that the actions and intent of the accused and co-accused are inextricably intertwined and inseparable, it is illogical to permit the statement of one to found a conviction, when it could not be used to solely found a conviction against the declarant if tried alone.[76] Therefore, statements of co-accused for or against each other are still confessions. By this reasoning, a verdict is not to be reached on the basis of co-accused's statements so given. Otherwise, using one confession to certify the trustworthiness of another confession is equal to using one uncertain factor to ascertain another uncertain factor, both to be confirmed by other evidence. The result would be that the accuracy of a verdict so reached is uncertain.[77] Thus, to reach the conclusion merely on the basis of co-accused's statements violates the spirit enshrined in Article 35. This implies that the co-accused are incompetent witnesses for or against one another.

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[75] Wang Gang Xiang, "Testimonial Qualification" (1983) 1 Jurisprudence 298 at 303-304; Xu Xiao Lu, "Witnesses" (1982) 3 J. of Wuhan University 268 at 277.

[76] Chao Shen Lin, *supra*, n. 70 at 277; Wang Gang Xiang, *supra*, n. 66 at 303-304.

[77] Sheng De Yong, "Several Theorytic Issues on the Statements of the Accused" (1984) 9 Law and Politics 37 at 41.

It is to be noted that in practice, the supposition of incompetence of co-accused prevails.[78] A good example is the trial of the "Gang of Four" in 1980.[79] At the trial the Supreme Court of China distinguished the co-accused from ordinary witnesses. Each of the joint accused, when narrating the facts as to other's participation in the crime, was heard merely as an accused rather than as a witness. Their statements were used as an independent type of evidence but not the testimony of ordinary witnesses.[80]

When tried separately or acquitted, the co-accused become competent witnesses for or against one another. It is generally thought that an accused, after his own trial has been completed and his criminal reliability laid, is no longer a party to the case and has no interest to the outcome of the trial and therefore he is competent to testify for or against other co-accused.[81]

However, the danger has been recognized that the courts may be well tempted to try one accused separately for the express purpose of using his statements to reach the conviction of other co-accused. Such a tactic, it is submitted, should be prohibited because it impaires just treatmnet of the accused.[82]

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[78] Wu Yie Ping, *supra*, n. 68 at 81; Wu Yi Gen, *Evidence* (Beijing: Masses Press, 1989) at 191.

[79] "Gang of Four" means the group consisting of Jian Qing, Zhang Chun Qiao, Yao Wun Yan and Wang Hong Wun. The four had formed a underground political committee aiming at overthrowing the communist government after the death of the former Chairman Mao Zhe Dong in 1976. The plan failed and they were brought to the trial for counterrevolutionary in 1980.

[80] Chen Guang Zhong and He Bing Shong, "The Evidentiary Issues at the Trial of Counterrevolutionary Gang of Jian Qing and Others" *People's Daily* (3 February 1981).

[81] Zhang Jie Shen, "Credibility of the Statements of Co-accused in Criminal Trials" (1988) 2 Law and Practice 24 at 26; Zhang Zhi Pei, *supra*, n.68 at 81.

[82] Sheng De Yong, *supra*, n. 77 at 41.

B. Compellability

The general rule is that all competent witnesses are compellable to give evidence and no refusal is allowed. However, in the case of co-accused, they are neither competent nor compellable to testify before the court.

It is to be noted that, although witnesses are obligated to testify, there is no law regulating the punishment for their failure to appear before the court. Thus, refusing to give evidence is not an unusual phenomenon in Chinese judicial practice. The existing method is to persuade the unwilling witnesses to testify by explaining to them the importance of their evidence to the justice to be done.[83] Yet no solution is available if witnesses remain unwilling to testify after this method is employed, and the courts are usually left no alternative in gaining evidence.

A COMPARATIVE VISION

As said in Chapter I, the adversarial system depends on more evidentiary rules than the inquisitorial system. This is reflected in the law as to competency of witnesses. The distinction between the two systems as to testimonial competence is two-fold: oath or affirmation is required and certain persons are excluded as witnesses in Canada, while there are no equivalent rules in its Chinese counterpart.

The alienation of Chinese law from the use of oath is rooted in the socialist rationale. According to the theory of the Marxist-Leninist-Maoist Materialism, material reality is objective and humen being's consciousness stems from the existence of the objective reality. For this reason the objective world is assessible to human knowledge. By contrast, the idea of swearing an oath is based upon the conception of the idealistic, subjectivistic epistemology proposing the outside world can not be entirely known. Hence, a Super Being is needed and believed to handle the matters beyond human being's ability. This belief in the oath is therefore, under the theory of Materialism, superstitious and ought to be disregarded.[84]

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[83] Xu Xiao Lu, *supra*, n. 75 at 271.

On the other hand, respecting criminal processes, the ideology of Materialism believes the entirety of truth-finding. This way a court is entitled to freely evaluate all logically relevant evidence for the purpose of finding the real truth. Therefore, the requirement of oath is, viewed as a barrier to the fact-finding precision, incompatible with the goal of Chinese criminal trials. For this reason the conception of oath has not been introduced and recognized in Chinese criminal justice.

In contrast, making an oath is still a prerequisite to competency of witnesses in Canada. The policy originally stemmed from the belief in a Supreme Being who will distribute punishment to those who tell lies. The solemnity of the oath is one guarantee that people will speak the truth. Even though the requirement of oath has been secularized, with affirmation as its alternative form, the oath remains a yardstick of measuring testimonial qualification, for the purpose of warning witnesses of the need to tell the truth.

It would not be surprising to find that a Canadian judge, if applying Chinese procedure, would be uneasy taking testimony from persons who are not sworn. Similarly, a Chinese judge applying Canadian processes will have difficulty in administrating an oath to witnesses since it is not intuitive to the judge.

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[84] Wu Yi Gen, *supra*, n. 78 at 118-130; Zhang Zhi Pei, *et al*, *Textbook on Chinese Criminal Procedure* (Beijing: Masses Press, 1987) at 192-194.

Another distinction between the two systems rests on the competence of certain classes of persons. Unlike Canadian law which excludes the accused and the accused's spouse as witnesses for the prosecution in order to ensure the right against self-incrimination and the protection of marital harmony, Chinese law contains no such limitations. As discussed, spouses are both competent and compellable to testify for or against each other under Chinese law. In the case of the accused, it deserves further analysis.

It is important to bear in mind that, although Chinese evidence law treats the accused differently from ordinary witnesses, it does not consequently narrow the scope of evidentiary sources. According to Article 90 of the *CEA*, the accused must submit to interrogation processes. Any questions can be asked of him by the prosecutor, and he is obligated to answer these questions unless they are irrelevant to the case. His attention is drawn to the right of objecting to any means of coercion inducing him to answer.[85] Therefore, to use the statements of the accused as an independent evidentiary source, Chinese courts regard the examination of the accused as main phase of criminal trials.[86] In summary, the accused in Chinese criminal processes is not exempted from giving evidence for or against himself.

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[85] *CPC*, Art. 32.

[86] *CPC*, Arts. 114-118 (first instance); 141 (appeal trial).

The underlying ideology supporting the competence of spouses and the accused in China is state positivism. Socialist philosophy deems state interest as representative of that of the individuals; personal interests basically accord with state interests.[87] Only if the state's fundamental interests are ensured, will the freedom and interests of individuals be fully protected.[88] Applied to the criminal justice system, these principles require that crimes, as factors threatening safety and stability of the state, must be strictly suppressed. This state interest outweighs marital and individual interests and, therefore, every citizen, including the accused and the accused's spouse, has a duty to give evidence to help the court reach the truth.

Additionally, based on a theory of Materialism, it is assumed that certainty of the entire truth in a case can be reached. To reach this goal, Chinese law makes no exemption for the accused and spouses from testifying. Otherwise these exclusions, deemed as evidentiary barriers hampering the real truth-finding, will impair the criminal justice to be done.

Therefore, one finds that, so far as the competence of the accused and spouses is concerned, Canadian law and Chinese law stand at two opposite ends. The practice of sacrificing individual's fundamental rights and freedoms and family harmony to the process of truth-finding seems cruel and inhuman in common law eyes, while the approach that subordinates state interests to individual rights would grate on Chinese jurists.

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[87] *Constitution of the People's Republic of China* in *The Laws of the People's Republic of China* (Beijing: Foreign Languages Press, 1987) v.1, 1. Arts, 1,2, 6-11. Pong Zhen, "Report on the Draft of the Revised Constitution of the People's Republic of China" (Address to the Fifth Session of the Fifth National People's Congress, 26 November, 1982) in *The Laws of the People's Republic of China* (Beijing: Foreign Languages Press, 1987) Part 2.

[88] Pong Zhen, *ibid.* parts 1,2,3.

Notwithstanding these differences, it appears that the distance between the two systems is not vast. Although Canadian law has more evidentiary barriers on competency of witnesses than Chinese law, the trend moving toward the commitment to the search for truth has been strongly felt. History has witnessed that, over the time, common law systems have shortened its long list of disqualifying persons to testify. Nowadays, this movement is at work in Canada. In the area of oaths, affirmation was created in order to permit a larger segment of population to give evidence. Unsworn testimony of the young, the mentally disabled or the elderly is heard at trials. In respect of spousal competence, the annulment of a marriage or irreconcilable separation no longer disqualify spouses under these circumstances to testify for the prosecution. Moreover, numerous statutory and common law exceptions have made spouses competent witnesses against one another regardless of the existence or non-existence of the marriage.

Similarity between the two systems can alos be spotted where the co-accused's competence is concerned. Although in Canada a co-accused is competent to testify for one another whereas this is unclear under Chinese law, both countries regard co-accused as incompetent witnesses against each other. Furthermore, both countries render a co-accused competent to testify for the Crown if he was tried separately or acquitted. Meanwhile, the danger of benefitting from derivative evidence by trying co-accused separately or acquitting one of them is appreciated by jurists in both countries. Therefore, judges from the two systems would encounter less difficulty of adjusting themselves when applying each other's criminal processes on this score.

Finally, mention should be made of the measures compelling unwilling witnesses to testify. The lack of compulsory force in China has resulted in great difficulties for courts to obtain evidence from witnesses and, consequently, has diluted the quality of the search for the real truth. It would be beneficial to Chinese law if it adopted the Canadian approach and removed this deficiency. Under Canadian criminal law, the kinds of punishment for refusal to testify include imprisonment[89] and a fine.[90] It is clear that, with these compulsory measures, the chances of obtaining the attendance of witnesses in court is larger in Canada than in China.

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[89] *CC, supra*, n. 7, ss. 545, 706, 707.

[90] *CC*, s.708.

CHAPTER III

PRIVILEGE AND CONFIDENTIAL COMMUNICATIONS

Privilege in the law of evidence means the right of some person or the State, and concurrently the duty of the witness, to withhold relevant and admissible evidence from the courts. It is different from the issue of competency and compellability. A witness may be competent, or compellable to testify about matters outside the scope of the privilege and yet may assert it when the examination touches on matters within the scope of the privilege, and this is so whether the witness is called by the prosecution or the defence.

Privilege is distinct from confidentiality. Not all confidential communications are protected by privilege but only certain ones which are recognized as essential to society that they override the needs of the administration of justice. In essence, confidentiality protects against *voluntary* disclosure, privilege protects against *compelled* disclosure.

The recognition of privilege is an evident limitation to the objective of pursuit of truth. If one excludes relevant information, truth will be based on information filtered through rules of exclusion. This chapter proposes to examine the following issues: (1) the privileges recognized respectively in Canada and China and the underlying policies and; (2) the differences and similarities arising between the two systems on the subject.

CANADA

A. Privilege Against Self-incrimination

Privilege against self-incrimination means the right of an accused person not to be compelled to testify against oneself by the State. In Canada, it involves three situations:

a. at the pre-trial stage, the accused has the right to remain silent;

b. during the trial, the accused has the right to refuse to take witness's stand;

c. in non-criminal proceedings such as public inquiries, the accused may be compelled to testify.

1. Pre-trial Privilege

At common law the accused's right against self-incrimination at pre-trial stage is protected by the well established confession rule.[1] The tenet of this rule is best described as follows:

> No statement by an accused is admissible in evidence against himself unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.[2]

In Canada, the confession rule is bolstered by the *Charter* right which entitles the accused to have counsel on arrest or detention.[3] It is manifest that the right to counsel enables the accused to remain silent and leave everything in issue to be conducted by his lawyer. Therefore, the statements of the accused, if obtained without informing him of the right to counsel, is a violation of the *Charter* and is accordingly inadmissible.[4]

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[1] *Ibrahim* v. *R.* (1914), A.C. 599 (P.C); *Commissioners of Customs* v. *Harz* (1967), 1 A.C. 760, 820 (H.L.); *Clarkson* v. *R.* (1986), 1 S.C.R. 383.

[2] *Ibid.*, *Ibrahim* at 609.

[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Charter*], s.10(b).

Apart from the accused's actual statements, does real evidence obtained improperly fall within the accused's pre-trial privilege against self-incrimination? Here, two situations are to be distinguished. First, as to the real evidence obtained in a manner violating the *Charter*, it is rarely excluded because it existed irrespective of the *Charter* breach and its use does not render the trial unfair.[5] Only under circumstances of flagrant *Charter* violation and the admission of evidence so obtained will, in the discretion of the presiding judge, bring the administration of justice into disrepute,[6] is real evidence to be excluded.

With respect to real evidence discovered or obtained as a result of the breach of confession rule or the right to counsel, at common law the basic rule was that such evidence was admitted.[7] Since the adoption of the *Charter*, if real evidence is obtained by the breach of the two kinds of the rights of the accused, there is a greater tendency toward the exclusion of such evidence. Therefore, real evidence obtained, after a violation of the *Charter*, by conscripting the accused against himself through a confession or other evidence emanating from him would tend to render the trial process unfair.[8] The reason for this is indicated by Lamer J. in *Collins*:

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[4] *R.* v. *Brydges* (1990), 1 S.C.R. 190; *Collins* v. *R.* (1987), 56 C.R. (3d) 193 (S.C.C.).

[5] *Collins*, *ibid.* at 211, 214.

[6] *R.* v. *Therens* (1985), 1 S.C.R. 613 at 652; *Collins*, *ibid.*; *R.* v. *Kokesch* (1990), 61 C.C.C. (3d) 207.

[7] *R.* v. *Wray* (1970), 11 D.L.R. (3d) 673,(S.C.C.).

> The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination. Such evidence will generally arise in the context of an infringement of the right to counsel. ... The use of self-incriminating evidence obtained following a denial of the right to counsel will generally go to the fairness of the trial and should generally be excluded. Several Courts of Appeal have also emphasized this distinction between pre-existing real evidence and self-incriminatory evidence created following a breach of the *Charter*...[9]

In *R.* v. *Ross*,[10] it was held that identification evidence obtained following violation of the right to counsel is inadmissible.[11] While the identity of the accused is not evidence emanating from the accused, identification evidence obtained through a lineup is evidence that cannot be obtained but for the participation of the accused and it is not simply pre-existing real evidence. When participating in a lineup, the accused is participating in the construction of credible inculpating evidence. Therefore, the use of such evidence, if resulting from the breach of the *Charter*, goes to the fairness of the trial.

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[8] *Collins*, *supra*, n. 4 at 211.

[9] *Ibid.*

[10] (1989), 46 C.C.C. (3d) 129.

[11] The admissibility of identification evidence has been a controversial subject. In *Marcoux* v. *R.* (1975), 24 C.C.C. (2d) 1 (S.C.C.), it was held that real or physical evidence taken from a person with or without his consent falls outside the privilege against self-incrimination. The identification evidence obtained through a lineup is included.

Also see *R.* v. *Smith* (1985), 49 C.R. (3d) 184 (N.S.C.A.).

2. The Privilege of the Accused as Witness at Trial

During the trial processes the accused's right against self-incrimination means his absolute right to decline to enter the witness box and to testify on his own behalf.[12] If choosing not to testify, the accused cannot be asked to answer any incriminating questions.

However, where an accused chooses to testify, he becomes a witness like any other ordinary witness. Under s. 5 of the *Canada Evidence Act*[13], a witness is not exempted from answering incriminating questions. The protection afforded is that such answers shall not be used against him or her in any other criminal proceedings.[14] Therefore, by entering the witness's box, the accused loses his privilege against self-incrimination and must answer incriminating questions put to him.

With respect to the accused's failure to testify, S.4(6) of the *CEA* provides that neither the judge or the Crown may comment on such failure when instructing the jury.[15] However, in *Vezeau* v. *R.*,[16] it was ruled that a judge should not direct that the jury must not draw an adverse inference from the accused's failure to testify. It is open to the jury to take the fact into account without being told. This was followed in *R.* v.

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[12] *Charter*, s.11(c). *R.* v. *Sweeney* (No. 2) (1977), 16 O.R. (2d) 814 (C.A.).

[13] R.S.C. 1985, c. C-5 [hereinafter *CEA*].

[14] "Any other criminal proceedings" means other independent, contemporaneous or subsequent criminal trials. *R.* v. *Mottola and Vallee* (1959), 124 C.C.C. 288 (Ont. C.A.) at 295.

[15] *Avon* v. *R.* (1971), 21 D.L.R. (3d) 442 (S.C.C.); *R.* v. *Chambers* (1980), 54 C.C.C (2d) 569 (Man. C. A.).

[16] (1976), 66 D.L.R. (3d) 418 (S.C.C.); also *Corbett* v. *R.* (1973), 42 D.L.R. (3d) 142 (S.C.C.).

Boss[17] which held that the *Vezeau* decision and s.4(6) do not violate ss.7 and 11(e) of the *Charter*.

In some cases, weight could be given to the accused's failure to testify by the court. This means, if the Crown's case strongly indicates guilt, there will be "an evidential burden" on the accused. If the accused, under this circumstance, fails to respond to the Crown's evidence, it is permissible for a jury to draw an adverse inference from the failure to testify.[18]

It is noteworthy that, in cases where a trial judge is sitting alone, if the Crown's case strongly indicates guilt, the judge can consider the adverse inference from the accused's failure to testify.[19] In appeal cases, where there was evidence of a direct nature which inculpated the accused and which the jury accepted as truthful, the Appeal Court may consider his failure to testify as a factor in disposing of the appeal.[20]

3. The Privilege of the Accused in Public Inquiries

Provinces have the authority to set up commissions of inquiry "aiming at investigating, studying and recommending changes for the better government of their citizens."[21] When conducting an inquiry, these agencies can compel a witness to give evidence under oath.[22]

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[17] (1988), 68 C.R. (3d) 123 (Ont.C.A.).

[18] R.J.Delisle, *Evidence: Principles and Problems* (2nd ed.) (Toronto: Carswell, 1989) at 552-553.

[19] *Pratte* v. *Maher and The Queen* (1965), 1 C.C.C. 77 (Que. Q.B.App. Side).

[20] *Corbett*, *supra*, n.16 at 145.

[21] *Starr* v. *Houlden* (1990), 55 C.C.C. (3d) 505 (S.C.C.).

Although in *Batary* v. *A.-G. Sask. et al*[23] it was ruled that a provincial *Coroner's Act* compelling an accused to testify at an inquest on the victim's death infringes the right against self-incrimination and is, therefore, *ultra vires* the province, there have been several cases ruling the accused to be a compellable witness.[24]

In *Starr*, it was held that a public inquiry cannot be used by a province to investigate the alleged commission of specific criminal offence by named persons. Usage of the inquiry process in this way, having regard to the ability to coerce those named individuals to testify, would in effect be circumventing the criminal procedure which is within the exclusive jurisdiction of Parliament.[25] As Lamer J., stated:

> While the commission no doubt was empowered to inquiry into certain potentially illegal activity, the inquiry's focus was on the more general issues of R.C.M.P. methods of investigation and wrongdoing in that context;...[26] and
> The present inquiry offends the principle that a province can not compel a person to submit to the questioning under oath with respect to her involvement in a suspected criminal offence for the purpose of gathering deficient evidence to lay charges or to gather deficient evidence to establish a *prima facie* case, ... I would declare the inquiry to be *ultra vires* the province.[27]

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[22] *R.* v. *Hoffman-La Roche Ltd.* (1981), 62 C.C.C. (2d) 118 (Ont. C.A.).

[23] (1965), 52 D.L.R. (2d) 125 (S.C.C.).

[24] In *R.* v. *McDonald, ex p. Whitelaw* (1963), 3 C.C.C. 4 (B.C.C.A.), the suspect was compelled to testify on the death of the victim; approved in *Faber* v. *R.* (1975), 27 C.C.C. (2d) 171 (S.C.C.); In *R.* v. *Quebec Municiple Commission; Ex Parte Longpre*, (1969), 11 D.L.R. (3d) 491 (Que.C.A.), the accused was compelled to answer questions related to the criminal offence by the Municiple Commission.

[25] *Starr*, *supra*, n. 21.

[26] *Ibid*, at 492.

[27] *Ibid*, at 505.

B. Privileged Communications

1. Solicitor-Client Privilege

1) General

The communications between clients and solicitors are privileged, neither the client nor the solicitor can be compelled to disclose the content of these communications.

The person making communications to his counsel can be the client himself or his agent. The counsel to whom communications are made shall be the one who is professionally qualified to practice,[28] or a clerk or subordinate of the solicitor.[29]

Communications to the solicitor, whether oral or written, are not automatically privileged unless they are made for the purpose of seeking legitimate legal advice. With so many solicitors working as employees or officers for corporations today, it is important to make distinctions as to the role of the solicitors: whether they serve as legal advisers or as administrative officers. If a solicitor performs duties for a corporation in a capacity other than as a legal adviser, the communications between the solicitor and the corporation will not fall into the scope of legal professional privilege.[30]

Privileged communications include any communications by the client to his solicitor; or those by the solicitor in response. The scope of privileged communications embraces those made for actual or anticipated litigation. In the latter case, where there is an anticipated litigation, the information, gathered by the solicitor or client (or agent) to assist the solicitor in conducting the case, is privileged.[31]

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[28] *Naujokat* v. *Bratushesky* (1942), 3 W.W.R. 97, 107 (Sask. C.A.) and *U.S.A.* v. *Mammoth Oil Co.* (1925), 2 D.L.R. 966 (Ont. C.A.).

[29] *R.* v. *Littlechild* (1979), 51 C.C.C. (2d) 406 (Alta.C.A.) held that a statement made to a clerk of the solicitor to obtain legal aid is privileged. Also see *Wheeler* v. *Le Marchant* (1881), 17 Ch. D. 675, 682.

[30] *Canary* v. *Vested* (1930), 3 D.L.R. 989 (B.C.S.C); *Alfred Crompton Amusement Machines Ltd.* v. *Commr. of Customs & Excise (No. 2)* (1972), 2 All E.R. 353, 376 (C.A.); *R.* v. *Harris* (1989), 7 W.C.B. (2d) 152 (Ont. Ct.).

Formerly, communications from a third party to a client's solicitor were not protected from disclosure.[32] Now they are subject to the solicitor-client privilege in Canada.[33]

To claim the privilege, the claimer -- be it the solicitor or the client -- should prove that the client consulted the solicitor with the intention of seeking legal advice.[34]

2) Exceptions to the Privilege

a) Consultation in Furtherance of Criminal Purpose

The privilege does not apply where the client consults the solicitor to further a criminal purpose of which the solicitor is ignorant. As Stephen J. justified in *R.* v. *Cox*:

> … for the protection of such communications cannot possibly be otherwise than injurious to the interests of justice, and to those of the administration of justice.[35]

To displace the claim of privilege, the opposite party must provide *prima facie* proof of fraud.[36]

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[31] *Wheeler*, *supra*, n. 29; *Greenough* v. *Gaskell* (1833), 1 My & K. 98; *Minet* v. *Morgan* (1873), 8 Ch. App. 361.

[32] *Wheeler*, *supra*, 29.

[33] Cases cited in P.K.McWilliams, *Canadian Criminal Evidence* (3rd ed) (Ontario: Canadian Law Book, 1991) c. 35 at 46-47.

[34] *Harris*, *supra*, n.30.

[35] (1884), 14 Q.B.D. 153, 167.

[36] Cases cited by McWilliams, *supra*, n. 33 c. 35 at 48.

b) Intercepted Communication between Solicitor and Client

Should solicitor-client communications be overheard or intercepted, or afterwards stolen, the privilege is lost.[37] The justification is offered by Professor Wigmore:

> ... Since the privilege is a derogation from the general testimonial duty and should be strictly construed, it would be improper to extend its prohibition to third persons who obtain knowledge of the communications. ... The same rule ought to apply to one who surreptitiously reads or obtains possession of a document in original or copy.[38]

c) When There is no Interest to Protect

The privilege may cease when the asserting party no longer has interest to protect. In *R.* v. *Yiannis*[39], for instance, the privilege of H., who had been convicted, gave way to permit the other co-accused to cross-examine H. as to a prior inconsistent statement given to their joint solicitor.

3) Substantive Rule

Formerly the solicitor-client privilege was merely recognized as a rule of evidence which could be raised during a trial. However, compulsory forms of pre-prosecution discovery, such as the search and seizure of solicitor-client communications by police, destroyed the confidence between the client and solicitor. This, according to Jackett C.J., breaches a fundamental principle of criminal justice and therefore is injurious to the judicial system.[40] In short, the problem arises that, even though the evidence obtained in pre-trial proceedings is inadmissible at trial, the confidentiality of solicitor-client communications is nonetheless destroyed.

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[37] *R.* v. *Tompkins* (1977), 67 Cr. App. R. 181; *Baker* v. *Campell* (1983), 49 A.L.R. 396.

[38] *Wigmore on Evidence* (McNaughton Rev.) vol. 8, s.2326.

[39] (1988), 87 Cr. App. R. 210 (C.A.). The similar case is *R.* v. *Dunbar* (1982), 68 C.C.C. (2d) 44 (Ont. C.A.).

[40] *Re Director of Investigation & Research and Shell Canada Ltd.* (1975), 22 C.C.C. (2d) 79 (F.C.A.).

In a number of cases, motions have been brought to quash search warrants on the ground that they defeated the solicitor-client privilege.[41] In *Solosky* v. *The Queen*,[42] Dickson J. acknowledged that the shift away from the rule-of-evidence-at-trial approach has taken place by logical extension.

Recently in *Descoteaux et al.* v. *Mierzwinski and A.-G. Que. et al.*,[43] the privilege was recognized as a substantive rule and not just a rule of evidence. The court ruled:

> ... the client's right to have his communications to his lawyer kept confidential will have an effect when the search warrant provided for in s.443 of the *Criminal Code* is being issued and executed.[44]

2. Marital Communications

S.4(3) of the *CEA* provides:

> (3) No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communications made to her by her husband during their marriage.

Strangely the privilege belongs to the recipient of the communication rather than to the communicant: "it is a mystery to me why it was decided to give this privilege to the spouse who is a witness."[45] The recipient spouse has the right to decide whether to reveal the marital communications. If the spouse chooses to disclose it, the privilege would cease automatically.[46]

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[41] *Re. Borden & Elliot and the Queen* (1975), 30 C.C.C. (2d) 337 (Ont. H.C.J.); *Re B.X. Development Inc. et al and The Queen* (1976), 31 C.C.C. (2d) 14 (B.C.C.A.); *Re Alder et al and The Queen* (1977), 37 C.C.C. (2d) 234 (Alta. S.C.T.D.).

[42] (1979), 50 C.C.C. (2d) 495 (S.C.C.).

[43] (1982), 70 C.C.C. (2d) 385 (S.C.C.).

[44] *Ibid.*

Marital privilege is limited to communications during marriage. A divorced person, a widow or a spouse after marriage annulment does not enjoy the privilege.[47] This rationale has been extended to irreconcilably separated spouses.[48]

The privilege does not apply to the communications overheard or intercepted by a third party.[49] However, with respect to communications intercepted by lawfully authorized wiretapping,[50] the case law has tended to protect the confidentiality of the conversations so gained.[51]

As to a spousal communication in furtherance of criminal purpose, the Quebec Court of Appeal ruled in *R.* v. *St. Jean*[52] that such conversations are not privileged.[53]

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[45] *Rumping* v. *D.P.P.* (1962), 46 Cr. App. R. 398, ,409.

[46] *Ibid.*; *R.* v. *Jean* (1979), 46 C.C.C. (2d) 176 (Alta, C.A.); Affirmed (1980), 51 C.C.C. (2d) 192n (S.C.C.); *Lloyd* v. *R.* (1982), 64 C.C.C. (2d) 169 (S.C.C.).

[47] *Shenton* v. *Tylor* (1939), 1 Ch. 620 (C.A.); *R.* v. *Kanester* (1966), 4 C.C.C. 231 (B.C.C.A.), per MacLean, J.A. approved (1967), 1 C.C.C. 97n (S.C.C.); *Layden* v. *North American Life Assur. Co.* (1970), 74 W.W.R. 266 (Alta.S.C.); *R.* v. *Marchand* (1980), 55 C.C.C. (2d) 77 (N. S. S. C. App. Div.)at 90-93.

[48] *R.* v. *Salituro* (1991), 68 C.C.C. (3d) 289 (S.C.C.).

[49] *Rumping*, *supra*, n. 45; *R.* v. *Armstrong* (1970), 1 C.C.C. (2d) 106 (N.S.S.C.App. Div.); *R.* v. *Kotapski* (1981), 66 C.C.C. (2d) 78 (Que.S.C.); *R.* v. *Kopinsky* (1985), 39 Alta. L.R. (2d) 150, 62 A.R. 100 (Q.B.).

[50] *The Criminal Code*, R.S.C. 1985, c. C-46, Part 6.

[51] *R.* v. *Jean*, and *Lloyd* v. *R.* at 187, *supra*, n.46.

[52] (1976), 32 C.C.C. (2d) 438 (Que. C.A.).

3. Other Confidential Communications

Apart from the solicitor-client privilege, martial communication privilege and the right against self-incrimination, the common law did not recognize privilege with respect to other confidential communications made to members of other professions, such as priests, physicians, psychiatrists or journalists.

However, case law has established a basis for asserting privilege. Wigmore has set out four conditions for the establishment of privilege for confidential communications:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
>
> (4) The injury that would incur to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.[54]

In *Slavutych* v. *Baker*,[55] Wigmore's principle was applied by the Supreme Court of Canada in ruling that a party should not use the confidential communications made to him as a spring board for an action against the person who confided the communications. Since then a number of cases have followed the *Slavutych* in adopting Wigmore's criteria

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[53] *Ibid.* at 441, 444.

[54] *Wigmore on Evidence* (McNaughton Rev.) vol. 8, s. 2285.

[55] (1975), 55 D.L.R. (3d) 224, 229 (S.C.C.).

as recognition of the protection of the confidential communications.[56] Recently in *R.* v. *Gruenke*,[57] the Supreme Court of Canada reaffirmed that a *prima facie* privilege of confidential communication can be given on a case-by-case basis if Wigmore's criteria are met.

However, it must be noted that the approach to the protection of other forms of privilege is applied rather conservatively in practice. In fact, it is, so far, only recognized in theory. In *Gruenke*, the priest-penitent conversation was held not be protected as it was not make with the purpose of confidence.

C. Public Interest Privilege

1. Definition of Public Interest Privilege

Although an important part of privilege rules, public interest privilege will not be comprehensively examined here because of its sparse relevance to the subject of this thesis. The focus will be on the protection of identity of police informers, which is a portion of the topic of witnesses.

It is well established at common law that certain information regarding governmental activities should not be disclosed in the public interest.[58] Generally two kinds of official documents are protected from disclosure: the *contents* of the particular documents in relation to a public interest, or a certain *class* of documents regardless if there is anything in the particular document relating to the public interest.[59] In the latter case, the retention of immunity from disclosure is designed to promote candour in the writer, and to improve efficiency in the public sector.[60]

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[56] Cases cited by Delisle, *supra*, n. 18 at 529 note 96. Also *R.* v. *Westacott* (1983), Crim. L.R. 545 (Medical); *R.* v. *R.S.* (1985), 19 C.C.C. (3d) 115 (Ont. C.A.), (for marriage or family consulting); *Re Church of Scientology and the Queen* (No. 6) (1987), 31 C.C.C. (3d) 449 (Ont. C.A.); *R.* v. *Medina* (1988), 6 W.C.B. (2d) 358 (Ont. H.C.J.) at 458-459 (Priest-penitent privilege). While in *R.* v. *Fosty* (1989), 46 C.C.C. (3d) 449 (Man. C.A.), the judge expressed his reservations as to this extension of privilege to religious conversations.

[57] (1991), 67 C.C.C. (3d) 289 (S.C.C.).

[58] *Smerchanski* v. *Astra Securities Corp. Ltd.* (1981), 58 C.C.C. (2d) 318 at 331-333 (Ont. C.A.); *Carey* v. *The Queen* (1986), 30 C.C.C. (3d) 498 (S.C.C.).

Confirmed by the *CEA*, the information protected from disclosure includes those relating to international affairs or national defence or security, or a confidence involving the Queen's Privy Counsel.[61]

2. Protection of Police Informer

The rule has been long established to protect the identity of informers from disclosure. Wigmore addressed the rationales as follows:

> because such communications ought to receive encouragement, and because that confidence which will lead to such communications can be created only by holding out exemption from a compulsory disclosure of the informant's identity.[62]

Witnesses for the Crown can not be asked to answer questions seeking to disclose the identity of the informer. Also witnesses can not be compelled to state whether they are themselves the informers.[63] As a rule of law, the protection of identity of the informers from disclosure is not subject to the discretion of the judge. To the contrary, the court is bound to apply it as long as the question relating this aspect is asked.[64] However, this privilege is not absolute. There is one exception to which this rule should yield. Lord Esher described in *Marks* v. *Beyfus*:

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[59] Delisle, *supra*, n. 18 at 510.

[60] *Duncan* v. *Cammell, Laird & Co.* (1942), A.C. 635 (H.L.).

[61] Ss. 37, 38, 39 of the *CEA*.

[62] *Wigmore on Evidence* (3rd ed.), vol. 8, s. 2374.

[63] *A.-G.* v. *Briant* (1846), 15 M. & W. 169, 153 E.R. 808; reaffirmed in *Bisaillion* v. *Keable* (1983), 7 C.C.C. (3d) 385 (S.C.C.).

> ... if upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to show the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail.[65]

In *Solicitor General of Canada et al* v. *Royal Commission of Inquiry into Confidentiality of Health Records in Ontario*,[66] the privilege was held to be that of the Crown, not of the informer. It is important to remember that the Crown can not, based on public interest, waive this privilege "either expressly or by implication by not raising it."[67] The early case of *R.* v. *Cobbett*[68] held that when there was no public prosecutor, the privilege was usually claimed by the judge.

It is noteworthy that since the *Charter*, the privilege of identity of police informers is no longer absolute. In *R.* v. *Garofoli*,[69] the Supreme Court held that, while the accused has no right to cross-examine the police informer, the trial judge should grant leave to cross-examine where the judge is satisfied that cross-examination is necessary to enable the accused to make full answer and defence. A basis must be shown by the accused for the view that the cross-examination will elicit testimony tending to discredit the existence of one of the pre-conditions to the authorization as, for example, the existence of reasonable and probable grounds. In *Lachance* v. *R.*[70], this decision was followed.

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[64] *Marks* v. *Beyfus* (1890), 25 Q.B.D. 494 (C.A.); adopted by the Supreme Court of Canada in *Bissailion, ibid*.

[65] *Ibid*, at 498; this passage was followed in Canada by *Humphrey* v. *Archibald et al* (1893), 20 O.A.R. 267; See also *Bisailion, supra*, n. 63; and *R.* v. *Hunter* (1987), 34 C.C.C. (3d) 14 (Ont. C.A.).

[66] (1981), 62 C.C.C. (2d) 193 (S.C.C).

[67] *Bisailion, supra*, n.63.

[68] (1804), 2 St. Tr. (N.S.)789.

[69] (1990), 60 C.C.C. (3d) 161.

CHINA

Chinese law does not recognize the concept of the privilege, with the sole exception that defence advocates can not disclose communications made to them in connection with the defence of the accused.

Article 7 of *The Provisional Regulations on lawyers of the People's Republic of China*[71] provides that:

> Lawyers shall have the responsibility to keep secrecy when in their work activities they come to learn state secrets and personal secrets of individuals.

Under Chinese law, all information that comes into a lawyer's possession in connection with the fulfilment of his duties as a defense counsel is privileged. Therefore, this may be information in relation not only to the defendant, but also to the victim, to a witness, to an expert, or even to a person who is not taking part in the case. Accordingly, a defence advocate may not testify, either under compulsion or voluntarily, against defendant if the information to which he is to testify was obtained while acting in the capacity of defence counsel.

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[70] (1990), 80 C.R. (3d) 374.

[71] Trans. Chin Kim in *The American Series of Foreign Penal Codes* v. 026 (London: Sweet & Maxwell, 1985) 105 [hereinafter *PRL*].

Nonetheless, the scope of attorney-client privilege under Chinese law is somewhat obscure. It is not clear whether this privilege extends to all information obtained by a counsel in connection with all types of legal assistance rendered to the client. Among the socialist variants, the explanation of Soviet leaders and jurists in this regard may throw some light on the subject:

> A defense counsel shall not be interrogated either with regard to information obtained directly from a client or with regard to information that he may have received from close relatives of the defense or from other persons, to the extent to which such information is connected with the execution of his professional responsibility.[72]

It is also not clear in the *PRL* whether the attorney's duty not to reveal information received in the course of the professional relationship with a client extends to physical evidence such as hidden weapon for a murder or stolen property found through that information.

It should be noted that, if an attorney, prior to becoming the defense counsel in a given case, becomes privy to information relating to the case in the course of other activities outside of a professional relationship with the defendant, the attorney must serve as a witness in that case instead of as a defence counsel by reason of the irreplaceability of the witness's testimony.[73]

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[72] L.Brezhnev, "Report of the Central Committee of the CPSU to the Congress of the CPSU" 100 (1971), cited in I.U.Stetsovskii, *Adokat v. Ugolovnom Sudoproizvodstve* (*The Advocate in Criminal Proceedings*) 18 (1972).

[73] Xi Xiao Lu, "Witnesses" (1982) 3 J. of Wuhan University 268 at 276-277.

Article 6 of the *PRL* provides that if a defence counsel is of the view that the accused has not stated a truthful version of the circumstances, then counsel is entitled to decline to continue to act for the accused. In practice, the usual way is that if a counsel learns of hidden facts of the case, or other crimes committed by his client, the counsel is obligated to persuade the accused to admit guilt frankly to the court, and to plead in mitigation by referring to extenuating circumstances favourable to the defendant.[74] After the attempt at persuasion, if the accused remains unwilling to disclose such hidden facts or other crimes, the defence lawyer is then entitled to refuse to act.

If defence counsel, in the course of representing a client, obtains inside information about another serious crime that was committed by the client other than that for which the accused is being tried, or counsel learns of an entirely different crime that was committed by another person who is presently not being prosecuted for, must the lawyer volunteer such information to the state law enforcement agencies?

Generally there are three propositions to be considered. Some contend that the attorney-client privilege is *relative* and must be balanced against other competing interests. The law provides that an action shall not constitute a crime if it is committed under extreme necessity.[75] Accordingly, if an advocate discloses confidential information gained in the capacity of defence counsel, he or she may be protected under Articles 17 and 18 of the *CCL* by invoking the affirmative defense of extreme necessity if by doing so he helps to save an innocent person from being convicted in a criminal process; or if it helps to avert an impending serious social danger. In any such situation the social duty of the lawyer to reveal the confidential information outweighs the legal and professional duty to protect such information. Therefore, if information as to the accused's other crimes unknown to the prosecution is volunteered in violation of Article 7 of the *PRL*, the lawyer is immune from prosecution under Articles 17 and 18 of the *CCL*.[76]

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[74] Fu Kuang Zhi, "Discussion on Testimony During Criminal Procedure" 4 Research on Law Science (1983) 37 at 38; Xong Xie Jie, *Chinese Judicial System* (Beijing: University of Chinese Politics and Law Press, 1986) at 173.

[75] *Code of Criminal Law of the People's Republic of China* trans. Chin Kim in *The American Series of Foreign Penal Codes* v. 025 (London: Sweet & Maxwell, 1982) 25 [hereinafter *CCL*].

Article 17 of the *CCL* reads:

> Criminal responsibility shall not be borne for an action of legitimate defense that is undertaken to avert present unlawful infringement of the public interest or the right the person or other rights of the actor or of other people.

Article. 18 reads:

The second proposition is that the attorney is obligated to disclose the confidential information obtained by him as to the accused's other crimes or as to the crimes committed by someone who has not being charged. The responsibility of the counsel is to safeguard the lawful rights and interests of his client, but not to protect any other unlawful interest.[77] In other words, the counsel should "prove the innocence of the defendant, the pettiness of the crime and need for a mitigated punishment or exemption from criminal responsibility."[78] While the accused's concealment of his other crimes or

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> Criminal responsibility shall be not borne for an action of urgent prevention that can not but be undertaken in order to avert the occurrence of present danger to the public interest or the rights of the person or other rights of the actor or of other people.

[76] All discussions on this account displayed in Chen Guang Zhong, "The Study on Chinese Procedure in the Past Fourty Years" (1989) 4 Journal of University of Chinese Politics and Law 5 at 13.

[77] Article 6 of the *PRL*.

[78] *Criminal Procedure Code of the People's Republic of China*, trans., Chin Kim in *The American Series of Foreign Penal Codes* v. 026 (London: Sweet & Maxwell, 1985) 33 [hereinafter *CPC*], Art. 28.

facts of the charged case is for the purpose of escaping the punishment of the states; such intention of concealment is obviously unlawful and therefore deserves no defence at all. Thus, the proponents suggest, if the accused insists on maintaining secrets in regard to other crimes or crimes committed by others, the defence lawyer should refuse to act. After retiring from the case, the lawyer must then disclose the confidential information to the judicial organizations. Because the lawyer is no longer in a professional relationship with his client and, consequently, is not bound to perform the non-disclosure duty.[79]

The third school of thought in Chinese doctrine contends that the attorney-client privilege is absolute and knows of no exceptions whatsoever.[80] Because the privilege is so fundamental and overriding that it may not be compromised by any other consideration. Chinese public interest and the best interest of criminal justice demand that all privileged information received by the defense counsel during the execution of the client's case not be subject either to voluntary disclosure or to compelled disclosure to the judicial organs through interrogation of the counsel.[81]

It is submitted that Article 7 of the *PRL* should be interpreted in a broad sense.[82] That is, a defense counsel should not, either in the process of a providing service as defense lawyer, or in any other contemporaneous proceeding or at any time in the future, be questioned in relation to any confidential information received regarding a present or a past client. Such information may relate to the case for which the client is being tried or to another crime with which the defendant is not being tried or which is unknown to the criminal investigator. Also the information may even relate to a criminal prosecution against a third party.

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[79] Tao Mao, "System of Defense Advocacy in China" in Zhang Zhi Pei *et al* eds. *Discussions on Issues of Chinese Criminal Proceedings in Theory and in Practice* (Xian: Law Press, 1987) at 173-174.

[80] Fu Kuang Zhi, *supra*, n. 74 at 38.

[81] Wu Yi Gen, et al, *Evidence* (Beijing: Masses Press, 1989) at 191; Xi Xiao Lu *supra*, n. 73.

[82] *Ibid*.

A COMPARATIVE VISION

It is clear that, so far as the issue of testimonial privilege is concerned, the distinction between the adversarial and inquisitorial system in the law of evidence is strongly marked. Canadian law, which contains numerous rules preventing the revealing of certain communications, presents more evidentiary obstacles in truth-finding during the criminal proceedings. In contrast, Chinese law, with the solicitor-client privilege as the sole exception, presents almost none of these concerns.

It is important to bear in mind that the difference between the two systems rests upon the considerations of social policies rather than the fear of misleading the jury.[83] As M.Damaska indicates:

> How will the two systems resolve the conflict between efficient pursuit of the truth and protection of values such as human dignity and privacy and the preservation of a general atmosphere of freedom? The one placing a very high premium on these other values will often remain committed to them even at the expense of truth discovery; in this sense it will be less 'truth oriented' than the system for which values unrelated to truth discovery are less weighty. The more 'truth oriented' system will be less willing to erect those evidentiary barriers that

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[83] E.M.Morgan, "The Jury and the Exclusionary Rules of Evidence" (1936-37) 4 U. Chi. L. Rev. 247 at 249-250.

are independent of the concern for fact-finding reliability.[84]

Therefore, the essence of the comparison regarding testimonial privileges in the two countries is to understand their respective underlying ideologies and attitudes.

Rooted in Western culture in which the factor of democracy plays a paramount role, Canada is not exceptional amongst nations respecting individualism as the paramount element in society. The core of individualism is the belief of a person's spiritual individuality, complexity and uniqueness. It is the person, not the government, who is the measure of all things. Therefore, government is a means to an end; accordingly the person should not have any obligation to sacrifice himself to government or the communities. Moreover, individualism asserts that government occupies only a limited sphere in an individual's life and must never absorb the individual totally.[85]

Individualism, in the administration of criminal justice, translates into the paramount significance of the protection of human dignity and safeguard of the individual's right to be left alone.[86] It follows that truth is but a means, while dignity is an end. Criminal justice would be devoid of meaning were it incidentally to deny the very human dignity which it is its ultimate purpose to protect.[87]

Based on this rationale, privilege is recognized as use of the safeguards of this individual's right to unfettered freedom, in certain human relations, from the state's coercive or supervisory powers.[88] As to privilege against self-incrimination, its purpose is to ensure that a person needs not expose the innermost self to public scrutiny or identify an interest with that of the community or state. The solicitor-client privilege is rooted in the principle of protecting client communications to enable an defendant to prepare for trial and enjoy a right of full answer and defence. Marital privilege is similarly rooted and is also based on the preservation of trust, confidence in domestic relationships.[89]

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[84] M.Damaska, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure" A Comparative Study" (1972-73) 121 U. Pa. L. Rev. 506 at 579.

[85] For a detailed and excellent analysis of individualism reflecting in criminal justice, see H.Silving, *Essays on Criminal Procedure* (Buffalo: Law Book Publishers, 1964) 189-222; 223-282; 283-294.

[86] J.T.Mcnaughten, "The Privilege Against Self-incrimination, Its Constitutional Affectation, Raison d'Etre and Miscellaneous Implications" (1960) 51 J. Crim. L. C & P.S. 135 at 138.

[87] Silving, *supra*, n. 85 at 215.

There is no doubt that the significance of individualism leads to the establishment of privilege which puts limitations on the pursuit of the truth. It is also noteworthy that, because they are obstacles to truthfinding, only certain relationships are protected. As Weatherston puts it:

> ... exceptions have been made when the public interest against disclosure *outweighs* the public interest in favour of full disclosure.[90] [Emphasis added]

Thus, under Canadian law, whenever a handicap of the adjudicatory process is caused by recognition of these certain privileges, it is the latter that prevails.

In contrast, communist ideology presents a converse relation on the issue of privilege. The *Constitution of the People's Republic of China*[91] indicates that communist

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[88] D.W.Louisell, "Confidentiality, Conformity and Confession: Privileges in Federal Court Today" (1957-58) 31 Tul. L. Rev. 101 at 110-111.

[89] *Ibid*, at 113.

[90] *Reference Re Legislative Privilege* (1978), 39 C.C.C. (2d) 226 (Ont. C.A.) at 241.

[91] *The Laws of the People's Republic of China* (Beijing: Foreign Languages Press, 1987) v.1, 1. [hereinafter *Constitution*].

China is a state expressing the will and interests of workers, the peasants, the intellectuals, and of all the working people and of all the nations and nationalities of the country.[92] Because these people form the majority component of the population, the communist state is founded upon the consent of people and is supported and trusted by them.[93] Accordingly, the absolute belief of state is at the heart of communist political theory: the state will do anything advantageous to its people and suppress the disagreeable. Such philosophy results in the dominion of the sovereign over all members of the society. An unequal contract between the citizens and the state establishes that the former is more or less the property of the latter and that the latter as owner may possess, use or dispose of this property at its discretion.

Guided by the theory of the absolute sovereignty of the state, it is manifest that the individualist ideas cannot be found in communist China. Flatly rejecting the philosophy of individualism, the Chinese ideology adopts the concept of collectivism. The ideal of communist collectivism is best stated as follows:

> This collectivist philosophy views each citizen as if he were a tree in a forest. The welfare of each tree must be seen in the context of the welfare of the entire forest. Each tree has an obligation to live in peace and harmony with its surroundings. It is contrary to the collectivist philosophy to attempt to destroy the entire forest in an effort to save one tree. If the tree's needs conflict with the welfare of the forest, the only option left to society is to prune or, if necessary,

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[92] *Constitution*, Arts. 1, 2,4.

[93] C.Osakwe submitted that Soviet legal ideology is based upon three constituent ideas: Plato's political philosophy; Hobbesian social contract theory, and Marxist economic ideology. All of these ideas constitute the communist notion imputing the absolute control and power of the state over its people.

Although a analysis as to Soviet law, this theme should also apply to Chinese legal system for both countries share the same foundation of socialism and communism.

C.Osakwe, "The Four Images of Soviet Law: A Philosophical Analysis of the Soviet Legal System" (1985-86) 21 Texas Int'l L.J. 1 at 12-20.

to cut down the tree.[94]

Mirrored in the matter of privilege, Chinese collectivism translates into a firm denial of this concept in the criminal law process. According to the communist theory, the nature of the socialist criminal justice represents the people's will and interest by punishing criminals and protecting the innocent. The interests of the collective must override that of the individual. Therefore, the philosophy of collectivism requires everyone, "for the peace and harmony of his surroundings", to help the judicial organs determine the truth of a case. To recognize testimonial privileges would amount to permitting "a tree to destroy the entire forest" and is therefore unacceptable in Chinese criminal proceedings.

In addition, the doctrine of "dialectical materialism" proclaims that reality is objectively given and fully assessible to knowledge and therefore the certainty of the truth in a case can be ultimately reached in criminal proceedings. Testimonial privileges, viewed as barriers to the finding truth, are contrary to the achievement of this goal and are accordingly unacceptable.

In short, under Chinese law, the rules as to privileges cast not only distrust on the state's ability to protect the citizens' interest, but also set blocks in the way of reaching the ultimate, real truth. Therefore, testimonial privilege is not tolerated and employed in China.

Although starting from entirely different points, it is patent that the two systems of privilege rules in Canada and China converge at the point of solicitor-client privilege.

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[94] *Ibid.* at 20.

Both countries recognize such confidential communications, and rest it upon the similar rationales. As explained by Jessel M.R regarding this rule at common law:

> ... by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to protect his rights and defend himself from an improper claim, should have resourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, ... that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent, ... that he should be enabled properly to conduct his litigation. That is the meaning of the rule.[95]

In China, although the role of counsel is less vigorous as compared to the common law, the rapid growth of the legal system has required better procedural skills in civil and criminal cases. In response to this need, the legal profession has been increasingly enhanced in numbers and quality.[96] The growing active role of lawyers and the guarantee of legal rights to the accused require the protection attorney-client communications. Therefore, the rationale stated by Jessel M.R. above, although referring to the common law, also applies to the reason of Chinese recognition of solicitor-client privilege.[97]

It should also be noted that, with respect to the rules of privilege, a common feature in the recent development in Canada and China is that ideological assumptions are replaced by more realistic and commonsense views. The result is that the two systems have approached toward one another at a large extent.

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[95] *Anderson* v. *Bank of B.C.* (1876), 2 Ch. D. 644, 649 (C.A.).

[96] "Report of the Ministry of Justice on Strengthening and Reforming the Jobs Concerning Lawyer's Affairs" (19 Dec. 1985), in *China Law Yearbook 1987* ed. by Wang Zhong Feng, et al (London: Butterworths, 1987) at 173-175; Han Depei and S. Kanter, "Legal Education in China" in *Law in the People's Republic of China*, ed. by R.Folsom and J.Minan (Dordrecht: Martinus Nijhoff Publisher, 1989).

[97] Also see the short analysis as to relational in support to the recognition of the solicitor-client privilege by Chan Shiu-Fan, "The Role of Lawyers in the Chinese Legal System" in R.Folsom and J.Minan, *Ibid.* at 220.

In Canada, rules as to privilege have radically deviated from the common law tradition for the sake of fact-finding. A salient example is that a witness is no longer permitted to refuse to answer incriminating questions. The only remaining protection is that such answers are not to be used against the witness in any other criminal proceedings. The privilege of the accused against self-incrimination is only meant his right to refuse to be a witness. If he chooses to testify, he will be treated as an ordinary witness and has to answer all the questions, including the ones might incriminate him. The purpose is to introduce more relevant evidence and to submit it to the trier of facts in a way that facilitates its unbiased evaluation. By this way it is expected that more real truth will be found and the trial will be fair.

Similarly, another important change in Canadian rules regarding privilege is that the confidentiality of marital communication no longer survives divorce, death or irreconcilable separation. Through this relaxation more logically relevant evidence is received, making it more likely that the truth in a case can be reached.

In addition, the common law rule as to the protection of the identity of police informers from disclosure has been loosened since *Charter*. The accused is permitted, at the discretion of the trial judge, to cross-examine an informer if it is necessary to enable the accused to make full answer and defence.

In China, the recognition of attorney-client privilege is a significant change in evidence law. Although pressing the absolute truth to be found at trial, Chinese law has realized that the protection of this privilege guarantees the fairness of a trial and reputation of criminal justice. It is interesting that, while Canadian evidence law is striving to approach toward the truth-finding by shrinking the scope of privilege, Chinese evidence law allows to a limited degree to tolerance of hidden facts. This phenomenon indicates that, notwithstanding the differences between the two systems, it is unavoidable that the essence of criminal justice more or less leads them to meet and agree at some common points. That is, to reach accurate judgements, the finding of truth is a prerequisite; to provide a fair criminal trial, the rights of the accused are the core. These are the two essential elements of criminal justice and they require a legal system, be it common law or civil law, to work its best to ensure these elements. This is the reason leading the two countries to approach toward each other. Moreover, it is this very nature of the criminal justice which will result in, radically or gradually, further disappearance of the differences between the law of privilege in the two countries in the future.

CHAPTER IV

EXAMINATION OF WITNESSES

The purpose of this chapter is to present, in a general way, a comparison of the evidentiary rules governing the examination of witnesses in Canada and China. The primary purpose of this presentation will be to introduce general principles but there remains the possibility that in some instances, where the Chinese law is not definite or specific on a particular matter, the Canadian legal rules may be of assistance. This approach to comparison might aid in the more effective application of the Chinese law to the end that truth and justice may be more equitably administered.

No reference will be made to the detailed procedures as to examination of witnesses unless such is necessary to explain the points of law pertinent to the main subject.

CANADA

The chief source of information for the trier of fact is oral testimony elicited from witnesses called by the parties, the witnesses testifying in response to questions. First, questions are asked by counsel of the party calling the witness, which is termed examination-in-chief; then the adversary takes his or her turn to put questions, which is called cross-examination. If necessary, at the discretion of the trial judge, the party calling the witness may question him or her again in re-examination; and the opponent's counsel may be permitted to ask further questions in re-cross-examination.

A. Examination in Chief

The purpose of examination-in-chief is to obtain evidence in support of the claims made by the party calling the witness. Hence, the aim of counsel conducting an examination-in-chief is to ensure that the witness gives evidence in the most convincing and lucid manner of which he or she is capable.

1. Leading Questions

A calling party is not permitted to ask its own witness any question which will suggest the answer. The reasons for this rule have been set out by Beck J.A. in *Maves* v. *Grand Trunk Pacific Railway Company*[1]:

> 'This seems based on two reasons: first, and principally, on the supposition that the witness has a bias in favour of the party bringing him forward, and hostile to his opponent; secondly, that the party calling a witness has an advantage over his adversary, in knowing beforehand what the witness will prove, or, at least, is expected to prove; and that, consequently, if he were allowed to lead, he might interrogate in such a manner as to exact only so much of the knowledge of the witness as would be favourable to his side, or even put a false gloss upon the whole.' (Quoted from Best on *Evidence*)[2]
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> I think a third reason may be added, namely, that a witness, though intending to be entirely fair and honest may, owing, for example, to lack of education, of exactness of knowledge of the precise meaning of words or of appreciation at the moment of their precise meaning, or of alertness to see that what is implied in the question requires modification, honestly assent to a leading question which fails to express his real meaning, which he would probably have completely expressed if allowed to do so in his own words.[3]

The application of the rule against leading questions should in practice be applied in following way. If the omitted part of the conversation by a witness, after several repetitions of the incident, is still not brought out, the trial judge may permit a question containing a reference to the subject-matter of the statement which it is supposed has been omitted by the witness. If this method fails, the trial judge should allow a question to be put to the witness containing the supposedly omitted matter.[4]

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[1] (1913), 14 D.L.R. 70, 73-77 (Alta. S.C.A.D.).

[2] *Best on Evidence.*

[3] *Supra.* n.1.

Although the common law prohibits leading questions, some exceptions have been well-established. For instance, introductory matters such as name, address, occupation;[5] undisputed matters;[6] identity of persons and things; to allow one witness to contradict another regarding statements made by that other; where the witness is either hostile to the questioner or unwilling to give evidence.

It is noted that the above list is not a closed one. Leading questions are allowed by the discretion of the trial judge when he sees "the examination shall be conducted in order best to answer the purpose of justice."[7]

2. Refreshing Memory

Frequently the following situation arises during the examination-in-chief: a witness in the stand suffers from a defective memory as to the incident he is expected to testify, either because of his nervousness or the lapse of time since the event. The general method counsel employs under such circumstance is to refresh the memory of his witness by means of a triggering device such as a note, or other written record associated with the transaction.[8]

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[4] *Ibid.*

[5] *R.* v. *Robinson* (1897), 61 J.P. 520.

[6] F.J.Wrottesley, *Examination of Witness in Court*, 3rd ed. (London: Sweet & Maxwell, 1961) at 50.

[7] *Bastin* v. *Carew* (1824), noted in the report of *Clarke* v. *Saffery* (1824), Ry & Mood. 126 at 127, 171 E.R. 966.

A distinction must be made between two terms described by Professor Wigmore -- "present memory revived" and "past recollection recorded."[9] Where by the triggering reference the witness's memory is revived and he presently recalls a fact or event, that is the "present memory revived". Where by the reference the witness has no present memory of the fact in dispute but is able to testify that on an earlier occasion he did have a perfect memory of the matter and that while he had that recollection he truly recorded the same, that is "past recollection recorded."

The difference between the two classifications demonstrably affects their usage as evidence at trials. In the instance of past recollection recorded, it is regarded as the substitute for the witness' memory and an addition to the testimony.[10]

To be admitted as evidence, past recollection must have been recorded while the witness's memory was fresh and accurate;[11] it should satisfy the qualifications of authorship, and verification set out by Phipson's treatise quoted in *Fleming* v. *Toronto*

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[8] *Faneli* v. *U.S.Gypsum*, 141 F. 2d 216, 217 (2d. Cir., 1944).

[9] Wigmore on *Evidence*, s.734-65 (Chadbourn rev. 1970).

[10] *The Queen* v. *Caesar Naidanovici* (1962), N.Z.L.R. 334, 339-40.

[11] Cases cited in P.K.McWilliams, *Canadian Criminal Evidence* 3d ed., (Ontario: Canadian Law Book, 1988) c.36 at 9.

Rg. Co.[12]; the original record should be used unless it is unavailable.[13]

In the case of present memory revived, the requirements applicable to past recollection recorded do not apply, because the triggering reference is a mere catalyst by which the witness restores his present memory as to the facts. It is the oral testimony based upon the newly-revived memory which is the evidence, not the device used to trigger the recollection.[14]

Under s. 30 of *Canada Evidence Act*,[15] a document is qualified as a record of past recollection, if it has been created "in the usual and ordinary course of business". It is admissible as evidence of the truth of its contents apart from its utility in refreshing the witness's memory.

3. Attacking One's Own Witnesses

(1) Impeaching Credit of Witness

It is a well established common law rule that a party is not permitted to impeach his own witness by attack on his character. The justification for this is the following:

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[12] (1911), 25 O.L.R. 317:

> The Law on the subject is, I consider, correctly laid down in Phipson on Evidence, 5th ed., p.466, as follows:'A witness may refresh his memory by reference to any writing made or verified by himself concerning and contemporaneously with the facts to which he testifies. ... The writing may have been made either by the witness himself or by others, providing in the later case that it was read by him when the facts were fresh in his memory, and he knew the statement to be correct.'

[13] *Doe d. Church and Phillips* v. *Pekins and Twenty-three Other* (1790), 3 T.R. 749 at 752; *Burton* v. *Plummer* (1834), 2 Ad. & E. 341 at 343-344; *Horne and Mackenzie* v. *MacKenzie and Munor* (1839), 61 Cl. & Fin. 628 at 636.

[14] *Henry* v. *Lee* (1814), 2 Chitty 124, 125, cited in Wigmore, *Evidence* (Chad. Rev.), s.759; *United States* v. *Riccardi* (1949), 174 F. 2d. 883.

[15] R.S.C. 1985, c. C-5 [hereinafter *CEA*].

> (To allow the party to impeach his own witness) would enable him to destroy the witness if he spoke against him (the party), and to make him a good witness if he spoke for him.[16]

However, if a witness testifies contrarily to what the calling party expects, the party is at liberty to call other witnesses to prove that the facts are otherwise. Here collaterally and consequentially the first witness will be discredited, for the later witnesses' testimony may show the evidence he gave was untrue in fact. Strangely, the England Statute in 1854[17] added a condition precedent to this rule: before granting the party calling other witness, the trial judge should believe the first witness was adverse. This restriction has been criticized as a "blunder" undermining the existing law in regard to the right of a party to contradict by testimony of other witnesses without leave of the judge.[18] Thus in *Hanes*,[19] it was concluded that this condition does not apply to the right to produce other evidence; the word "adverse" in s.9 of the *CEA* can not be construed as having this effect on this aspect. However, it is strange that this "blunder" is still not swept from s.9(1) of the present *CEA*.

(2) Prior Inconsistent Statement

S. 9 of the *CEA* allows a party to cross-examine his own witness as to a previous inconsistent statement in order to ascertain what induced him to change it.[20] To question one's witness about his prior inconsistent statement does not, when meant to suggest that the witness is mistaken, necessarily impugn his character, although it may affect his credibility indirectly.

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[16] Buller's *Nisi Prius*, at 297, quoted in *Wright* v. *Beckett* (1833), 174 E.R. 143, 144 (C.C.P.).

[17] *Common Law Procedure Act* (Lord Denman's Act) 17 & 18 Vict., c. 125, s.22.

[18] Per Cockburn C.J. in *Greenough* v. *Eccles* (1895), 141 E.R. 315 at 321.

[19] *Wawanesa Mutual Insurance Co.* v. *Hanes* (1961) O.R. 495 (C.A.).

[20] Also see early cases at common law: *Wright* v. *Beckett* (1833), 1 M. & Rob. 414; *Melhuish* v. *Collier* (1850), 19 L.J.Q.B. 493.

Before granting this use of contradiction, the trial judge is required to decide whether the witness proves adverse to his calling party. This condition raises two issues: first, what is the meaning of the word "adverse"; second, can a prior inconsistent statement be used in determining the adversity of the witness?

In *Greenough* v. *Eccles*,[21] the orthodox view was established that "adverse" meant "hostile"; further, it was held that in reaching a ruling of hostility of the witness, the prosecution could not adduce proof that the witness had made a prior inconsistent statement. The result then was that if a witness disappointed or surprised a party by testifying contrary to or inconsistently to a prior statement and did not admit to having made such a prior inconsistent statement the party could not prove the making the prior inconsistent statement and could not cross-examine the witness thereof. This result had been criticized both in England and Canada.[22] In *Hanes*,[23] "adverse" was taken by Ontario Court of Appeal to mean "opposed in interest" which would include "hostile" but of course be much broader. The evidence of adversity might come from the witness's demeanour, or it might be shown to the judge by evidence that the witness had made an prior inconsistent statement.

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[21] *Supra*, n.18.

[22] In England, *Rice* v. *Howard* (1886), 16 Q.B.D. 681; In Canada, *R.* v. *May* (1915), 23 C.C.C. 495 (B.C.C.A.).

[23] *Supra*, n.19.

The decision in *Hanes* was adopted dividedly in different cases. In *R.* v. *Cassibo*,[24] the Ontario Court of Appeal adopted the approach that adversity equalled hostility but that the fact of a prior inconsistent statement was sufficient evidence of hostility and that it was not dependent upon attitude or demeanour. In *R.* v. *Marceniuk*,[25] the approach of requiring some evidence of hostile manner is followed.

S. 9(2) of the *CEA* was designed to adopt the wisdom of the *Hanes* case into criminal matters and to thus allow the adversity, demanded by subsection 1, to be demonstrated not only by the witness's demeanour or bearing but also by cross-examination on an alleged prior contradictory statement.

However, this subsection, confined to written statements, was interpreted as a new and independent method for discrediting own's own witness, which expressly avoids the necessity of any ruling that the witness first be ruled adverse. In *R.* v. *Milgaard*,[26] it was so said:

> (1) ... When such permission [to cross-examine under subs.(2)] has been granted, the right to cross-examine is a limited one; it is confined to cross-examination relative to the inconsistencies as disclosed in the statement. Under the section, however, if a subsequent application is made to declare the witness hostile, the learned trial judge may consider the cross-examination as to the inconsistent statement in considering whether the witness is hostile. If the witness is declared to be hostile, then the right to cross-examine is not restricted.[27]

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[24] (1983), 70 C.C.C. (2d) 498 (Ont. C.A.).

[25] (1923), 3 W.W.R. 758 (Alta. C.A.); *R.* v. *Koester* (1986), 47 Alta. L.R. (2d) 407 (C.A.).

[26] (1971), 2 C.C.C. (2d) 206 (Sask.C.A.).

[27] *Ibid.* at 220-222.

According to this interpretation, after cross-examining the prior inconsistent statement, counsel has already achieved his purpose of contradiction. Therefore, there is no need to resort to s.9(1) again after this unless the counsel is to pursue general cross-examination based on a ruling as to the witness's adversity.

Note the changing attitute toward the use of prior inconsistent statements. The orthodox common law rule in this regard is that prior inconsistent statements are admissible only to impeach a witness's credibility, not as evidence of the truth of their contents. However, in a recent case of *R.* v. *K.G.B.*,[28] the Supreme Court held that prior inconsistent statements of witnesses should be admitted as substantive evidence on a principled basis, the governing principles being the reliablility of the evidence and its necessity. The reliability is based upon: (i) the statement is made under oath, solemn affirmation or solemn declaration, (ii) the statement is videotaped in its entirety, (iii) the opposing party has a full opportunity to cross-examine the witness at trial respecting the statement. Necessity has usually been satisfied by the unavailability of witness. However, it is important to remember that the necessity criteria must be given a flexible definition, capable of encompassing diverse situations.

4. Supporting Credibility

(1) General Rule Prohibiting

A party is not permitted to produce general evidence to support or bolster the credit of his or her own witness. When the witness's character of truthfulness has been impeached by evidence of general reputation, opinion or specific instances of misconduct, the witness may be rehabilitated by evidence of good character. The reason for this is described as follows:

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[28] (1993), 1 S.C.R. 740.

> ... There is no reason why time should be spent in proving that which may be assumed to exist. Every witness may be assumed to be of normal moral character for veracity, just as he is accused to be of normal sanity. Good character, therefore, in his support is excluded *until his character is brought in question* and it thus becomes worthwhile to deny that his character is bad.[29]

(2) Exceptions

In *R.* v. *Jones*,[30] the following categories were exhibited as exceptions to the general rule prohibiting evidence supporting the witness's credibility:

a. where recent fabrication is alleged;

b. recent complaints in sexual cases;

c. statements made with respect to previous identification of an accused;

d. where the previous consistent statement is admitted as part of the *res gestae* or part of the motive;

e. statement on arrest;

f. statement on recovery of incriminatory articles.

The underlying reasons for these exceptions under categories a, b, and c, are akin: fairness to witnesses requires that evidence supporting other evidence that may cast doubt on their testimony should be permitted. As to prior identification, the jury may doubt that the witness has correctly identified the accused because of the obvious location of the accused in the prisoner's dock and thereby suspect the present identification.[31] In the case of "recent complaint", it is assumed that a raped woman would naturally speak out about it thereafter and, if nothing was said at trial about the earlier complaint, the trier may reject the veracity of her present testimony.[32] With regard to the prior consistent statement, an accusation of recent fabrication may cast doubt on the witness's present testimony.[33] Therefore, under these circumstances, introduction of a previous consistent statement may remove the doubt and confirm the present account.

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[29] 4 Wigmore, *Evidence* (Chad. Rev.), s. 1104 accepted in *R.* v. *Clarke* (1981), 63 C.C.C. (2d) 224, 233 (Alta. C.A.). See also *R.* v. *Martin* (1980), 53 C.C.C. (2d) 425 (Ont.C.A.).

[30] (1989), 44 C.C.C. (3d) 248, 256 (Ont. C.A.).

It should be noted that evidence of previous consistent statement is not received as evidence to prove the truth of case but only to confirm the present testimony and to counter the influence of the assumption that might otherwise flow from silence.

Some points are noteworthy in regard to recent complaint evidence. First, it has been suggested that this exception should be extended to cover prosecutions other than sexual offenses.[34] Second, s.275 of the *Criminal Code*[35] abolishes the use of such evidence in certain cases, mostly sexual offences involving young children.

B. Cross-examination

The purposes of cross-examination are two-fold. First, to elicit testimony relating to substantive issues helpful to the cross-examining party's case or harmful to his opponent's case. Second, counsel can discredit the witness so that the trier of fact may discount the truthfulness of the witness's testimony, which is also called "impeachment of witness."

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[31] *R.* v. *Christie* (1914), A.C. 545, 551 (H.L.).

[32] 4 Wigmore, *Evidence* (Chad. Rev.), s. 1134-1139.

[33] *Fox* v. *Gen. Medical Council* (1960), 3 All E.R. 225, 230.

[34] *R.* v. *Christenson* (1923), 2 D.L.R. 379 (Alta.C.A.) per Beck. J. suggesting the exception should operate in all crimes of violence, sexual or non-sexual. Also see the evolution of this point encompassed in *R.* v. *Lebrun* (1951), 100 C.C.C. 1 (Ont. C.A.).

[35] R.S.C. 1985, c. C-46 [hereinafter *CC*].

1. Prior Inconsistent Statement

The use of a witness's prior inconsistent statement to impeach his credibility was well established at common law.[36] If counsel can establish that the witness had said or written something earlier which is inconsistent with his present testimony on the same subject, he then display to the trier of fact the capacity of the witness to err.

Sections 10(1) and 11 of the *CEA* provide:

> 10.(1) Upon any trial a witness may be cross-examined as to previous statements made by him in writing, or reduced to writing, relative to the subject-matter of the case, without the writing being shown to him; but, if it is intended to contradict the witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing that are to be used for the purpose of so contradicting him; the judge, at any time during the trial, may require the production of the writing for his inspection, and thereupon make such use of it for the purpose of the trial as he thinks fit.
>
> 11. Where a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he had made such statement, proof may be given that he did in fact make it, but before such proof can be given the circumstance of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement.

Note that written statement is dealt with in s.10. It was once a common law rule settled by *Queen Caroline's Case*[37], that the writing must be shown to and read by the witness before counsel could question him about the statement. This was criticized for, among its shortcomings[38], depriving counsel of the advantage of surprise and defeating the effectiveness of cross-examination.[39] Therefore it was removed by statute in England in 1854[40], and then copied in Canada as stated above in s.10.

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[36] As to the development of this rule, see R.J. Delisle, *Evidence: Principles and Problems* (Toronto: Carswell, 1989) at 246-247.

[37] (1820), 129 E.R. 976 (H.L.).

S.11 concerns oral inconsistent statement. In *Queen Caroline's Case*, the common law rule was settled that counsel, before proving the inconsistency by independent evidence, had to inquire of the witness about the said statement and receive his denial of having made it.[41] This requirement is still maintained.

It is noteworthy that in Canada, the prior inconsistent statement used for contradiction must be "relative to the subject-matter of the case." Pollock C.B. stated this substantive issue in *Attorney General* v. *Hitchcock*[42] as "those matters which may be given in evidence by way of contradiction, as directly affecting the story of the witness touching the issues before the jury, ...".[43]

A prior inconsistent statement, whether sworn or not, does not become evidence simply because the witness is cross-examined upon it. Only when it is adopted by the witness as true does it become a part of the witness's testimonial response,[44] otherwise it will go to the issue of the witness's credibility. However, note that in *K.G.B.*,[45] as stated above, it was ruled that prior inconsistent statements can be used as evidence of the truth of its contents if circumstantial guarantees of reliability of the statements are secured.

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[38] A.W.Bryant, "The Adversary's Witness: Cross-Examination and Proof of Prior Inconsistent Statements" 62 Can. Bar Rev. 43 (1984) at 52-53.

[39] 4 Wigmore, *Evidence* (Chad. Rev.), s. 1259 at 617-626.

[40] *Common Law Procedure Act*, 1854 (U.K.) c. 125, s. 24; *Criminal Procedure Act*, 1865 (U.K.) ss. 3,4,5.

[41] *Supra* n. 37 at 988.

[42] (1847), 154 E.R. 38 (Exch. Ct.).

[43] *Ibid.* at 42-43.

2. Bias

A witness may suppress his testimony in favour of a party because of factors such as friendship, blood relatives, group loyalty and so forth. Because bias, for or against a party, betrays emotional partiality which may impair the witness's testimonial qualifications. Matters as to bias is often explored for impeachment purposes.

Facts as to bias or partiality can be elicited by cross-examination of the witness. If the witness admits his bias, that should be the end of it. If the witness denies it, counsel can prove his partiality by independent evidence.[46]

3. Character

A well-recognized common law rule is that a witness can be asked questions as to his character for the purpose of weakening his testimony. Character of a witness includes various aspects, e.g. a witness's associations with criminals, the witness's their prior misconduct or convictions and so forth.

Nevertheless, there are exceptions to this general rule and they deserve special examination.

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[44] *Deacon* v. *The King* (1947), 89 C.C.C. 1 (S.C.C.).

[45] *Supra*, n.28.

[46] *General Films Ltd.* v. *McElroy* (1939), 4 D.L.R. 543, 549 (Sask. C.A.).

(1) Accused as Witness

a. General

Early case law did not afford any protection to an accused from cross-examination over and above that available to the ordinary witness.[47] If an accused chose to testify, then the accused could be exposed, like other ordinary witnesses, to questions regarding character.

This practice has been criticized and some courts[48] have recognized that an accused who decides to testify exposes himself to a greater possibility of prejudice than the ordinary witness. As cited in *R.* v. *Corbett*:

> An accused who gives evidence has a dual character. As an accused he is protected by an underlying policy rule against the introduction of evidence by the prosecution tending to show that he is a person of bad character, ... As a witness, however, his credibility is subject to attack. If the position of an accused who gives evidence is assimilated in every respect to that of an ordinary witness he is not protected against cross-examination with respect to discreditable conduct and associations, ... It would be virtually impossible for him to receive a fair trial on the specific charge upon which he is being tried. It is not realistic to assume that, ordinarily, the jury will be able to limit the effect of such a cross-examination to the issue of credibility in arriving at a verdict.[49]

Hence in *Koufis* v. *R.*[50], the Supreme Court of Canada held that an accused, apart from questions as to previous convictions, should not be cross-examined with respect to his bad character unrelated to the charge for the purpose of impeachment.

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[47] *R.* v. *Cannors* (1893), 5 C.C.C. 70, 72 (Que. Q.B.); *R.* v. *D'Aoust* (1902), 5 C.C.C. 407, 411 (C.A.).

[48] See e.g., *Colpttis* v. *R.* (1965), S.C.R. 739; *Koufis* v. *R.* (1941), S.C.R. 481 and *R.* v. *McLaughlan* (1974), 20 C.C.C. (2d) 59 (Ont. C.A.).

[49] (1988), 1 S.C.R. 670, 691, cites J. A. Matin in *R.* v. *Davison* (1974), 20 C.C.C. (2d) 424 (Ont.C.A.).

[50] (1941), S.C.R. 481; see also *Davison*, *ibid.*

b. The Accused's Previous Conviction

Anomalously, s.12 of the *CEA* provides that the accused may, like other ordinary witnesses, be discredited by his prior convictions.

For the same reasons found in *Corbett*, which renders an accused as witness is exposed to greater prejudice than the ordinary witness, the interpretation of s.12 and its use in practice have stirred some criticisms.[51] For example, in *R.* v. *Titchner*,[52] it was suggested that the trial judge has authority to prevent some questions put to the accused if he testifies during cross-examination under s.12. This was supported by the decision in *R.* v. *Leforte*[53] which held that, when the prejudicial effect of proving the previous convictions outweighs the probative value to the accused's credibility as witness, questions as to the accused's prior conviction are not to be asked.

Clearly, statutory amendment of s.12 is needed to clarify the protection of an accused as a witness from being impeached by his prior convictions.

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[51] E.g., the limiting charge to the jury about the accused's prior conviction is fruitless, for the jurors will inevitably infer from considering it that he is a bad man. Doob & Kirshenbaum, "Some Empirical Evidence on the Effect of Section 12 of the Canada Evidence Act Upon an Accused" (1972) 15 Crim. L.Q. 88; Hans & Doob, "Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries" (1976) 18 Crim. L.Q. 235.

If the accused avoids the questions of his criminal record by not testifying, he runs the risks of some detrimental comment by the trial judge or Crown counsel skirting the prohibition of section 4(5) of the *Canada Evidence Act*. *Wright* v. *The King* (1945), S.C.R. 319. Moreover, even if no such comment is made, the trier of fact may legitimately infer that the accused failed to testify because he was afraid to reveal his guilt. See S.A.Schiff, *Evidence in the Litigation Process* (Toronto: Carswell, 1983) v. 1 at 549-550.

[52] (1961) 131 C.C.C. 64 (Ont.C.A.). However, see the contrary decision in *R.* v. *Stratton* (1978), 42 C.C.C. (2d) 117 (Ont. Gen. Sess. of Peace).

[53] (1961), 131 C.C.C. 169 (S.C.C.).

(2) Primary Witness in Prosecution of Sexual Assault

At early common law the complainant in a rape case was exposed to cross-examination with respect to both her sexual acts with the accused on other occasions[54] and also her general sexual reputation.[55] This rule was criticized as placing undue harassmnet to the witness and which led many rapes were unreported, for the victims viewed the courtroom as being as terrifying as the offence itself.[56]

Today, under the *CC*[57], evidence as to the complainant's sexual reputation is not admitted for the purpose of impeaching or supporting her credibility, for "there is no logical or practical link between a woman's reputation and whether she is a truthful witness."[58]

S. 276 of the *CC* provides a blanket prohibition of the use of evidence as to the witness's past sexual conduct with any person other than the accused unless certain conditions are met. In *R.* v. *Seaboyer*,[59] it is ruled that this prohibition deprives the accused of the right to full answer and defence, for it excludes some evidence having probative value on an issue at the trial. Therefore, the court concluded that evidence relating to the complainant's past sexual conduct can not be used solely for the purpose of attacking her credibility. If the evidence possesses probative value and such value is not substantially outweighed by the danger of unfair prejudice flowing from the evidence, it should be adduced for the purpose of arriving at the truth and protect the innocent accused from being convicted.

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[54] Cardozo, *The Nature of the Judicial Process* (1921) at 156.

[55] *R.* v. *Barker* (1829), 172 E.R. 558.

[56] *R.* v. *Moulton* (1979), 51 C.C.C (2d) 154, 165 (Alta.C.A.).

[57] *Supra*, n. 35 s. 277.

[58] *R.* v. *Seaboyer* (1992), 66 C.C.C. (3d) 321 (S.C.C.).

[59] *Ibid.*

Before evidence as to consensual sexual conduct on the part of the complainant is accepted, the trial judge must ensure on a *voir dire* that it is tendered for a legitimate purpose, and that it logically supports a defence. If the trial judge decides to receive the evidence, then the judge should charge the jury not to draw an impermissible inference from such evidence, but to consider its use for the purpose of arriving at truth by its probative value.

4. Defects of the Witness's Capacity of Telling the Truth

Matters regarding the witness's ability to observe, recall or communicate the incident can be examined by counsel in attempt to weaken his credibility. Moreover, extrinsic evidence may be adduced to prove the deficiency if the witness denies it.

This rule has been established since *R.* v. *Toohey*,[60] in which Lord Pearce stated:

> ... When a witness through physical (in which I include mental) disease or abnormality is not capable of giving a true or reliable account to the jury, it must surely be allowable for medical science to reveal this vital hidden fact to them. ... So, too, must it be allowable to call medical evidence of mental illness which make a witness incapable of giving reliable evidence, whether through the existence of delusions or otherwise.[61]

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[60] (1965) A.C. 595 (H.L.). Cases in Canada can be traced: *R.* v. *Dirtrich* (1970), 1 C.C.C. (2d) 49 (Ont. C.A.); *R.* v. *Hawke* (1975), 22 C.C.C. (2d) 19 (Ont. C.A.).

See also E.G.Moore, "Note --The Admissibility of Medical Evidence to Impugn the Reliability of Witness" (1965) 23 Cambridge L.J. 176 and "Note, Psychiatric Evaluation of the Mentally Abnormal Witness" (1949-50) 59 Yale L.J. 1324. See also Hoski, "Use of Psychiatric Evidence as to Credibility of Witness in Criminal Trials" (1976) 3 Queen's L.J. 40.

[61] *Toohey*, *ibid.* at 607-608.

CHINA

A. Non-distinction Between Examination-in-Chief and Cross-examination

There is no distinction between examination-in-chief and cross-examination in Chinese criminal proceedings. The reason for this is that, unlike the party-presentation trial form, Chinese judges retain control over the trial and, therefore, they plays a leading role in adducing and presenting evidence.

Based on the principle that the goal of a trial is to reach the objective truth, the Chinese inquisitorial system expects all the major participants in the process - the judges, prosecutor, police and defence counsel - to work together in the search. Moreover, because of the special situation of the defendant in a criminal process, a heavy obligation is placed on the police, prosecutor and judges to find out both the incriminating and the exonerating evidence. On the other hand, because defence counsel is not allowed, as discussed before, to conduct the case until the trial stage,[62] counsel's role is confined to seeking either an acquittal or a mitigation of the criminal liability of the accused. This means that in practice major actors in the criminal proceedings are expected to cooperate to defend the rights and legal interests of the defendant. Therefore, the burden of proof is on the police, prosecutors and the judges.[63]

For this reason, there are no "prosecution witnesses" or "defence witnesses" in

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[62] *Criminal Procedure Code of the People's Republic of China* trans. Chin Kim in *The American Series of Foreign Penal Codes* v. 026 (London: Sweet & Maxwell, 1985) 33 [hereinafter cited as *CPC*], Arts. 29, 30 and 113.

[63] Zhang Zhi Pei, *et al*, *Textbook on Chinese Criminal Procedure* (Beijing: Masses Press, 1987) at 210-21; Wu Yi Gen, *Evidence* (Beijing: Masses Press, 1989) at 88-90.

Chinese criminal proceedings. All witnesses come to the court to assist in the elucidation of the facts, not to support either side. Therefore, the forms and sequences of direct examination and cross-examination developed at common law make no sense in China. The result is that, by means of the lack of the examination-in-chief and cross-examination, there are fewer rules concerning the use of evidence in the inquiry of witnesses at Chinese criminal trials.

B. General Rules

1. Leading Questions

In Chinese trials, no leading questions are allowed.[64] The definition of a leading question at a Chinese trial is described by the Chinese jurists as "a question presuming a fact which it is the purpose of the trial to prove" or "a question containing a particular person, quality or circumstance which implies a desired fact to be admitted".[65]

The reason for prohibiting leading questions is that they take advantage of a witness, embarrass the witness and considerably restrict his or her freedom of response.[66] It has been pointed out that:

> the witness will answer before the judge in such a way that he will not hurt the judge, whom he fears and for whom he has reverence, or the party who

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[64] There is no equivalent Article in the *CPC* concerning prohibition of leading questions. However, both in theory and in practice, no use of leading questions is suggested and employed. See Fu Kuang Zhi, "Discussion on Testimony During Cirminal Procedure" (1983) 4 Research on Law Science 37 at 39; Fang Chong Yi, *et al.*, *Chinese Criminal Procedure* (Beijing: University of Chinese Politics and Law Press, 1991) at 297.

[65] Luo Da Hua, "Research on the Impact of Leading Questions on Testimony" (1988) 5 Joural of University of Chinese Politics and Law 46 at 46-47, 49.

[66] *Ibid*; also see Whalen, *The Value of Testimonial Evidence in Matrimonial Procedure*, The Catholic University of America, Canon Law Studies, num. 99 (Washington, D.C.: The Catholic University of America, 1935) at 186.

> introduced him into the case. Thus, if he hears the judge assert a fact, he will easily be induced to assent to it, lest he should incur his wrath or lest he irreverently contradict him.[67]

To avoid leading questions, the general process of examination of witnesses is that the inquirer first asks general questions and then proceeds to the particular ones. Because the witness, before being examined on a specific question, will have already testified to the matter or incident in question and thus there is no danger of suggesting an answer.[68] As long as the witness has testified to a fact, that incident becomes the subject of legitimate questions.[69]

Despite the prohibition of leading questions during a trial, some exceptions to the rule, under certain circumstances, have arisen. For example, questions concerning the identity of a person such as name, age, occupation are not regarded as suggestive.[70] Also, leading questions are allowed when the witness is mentally deficient for the purpose of eliciting the knowledge of the witness if the presiding judge sees necessary.[71] It is further suggested that, when having already known the fact firmly, the judge may propose leading questions regarding the same matter in order to confirm it.[72]

There is no fixed list of exceptions. A trial judge should exercise his or her discretion, in the circumstances of individual cases, to determine whether a leading question should be allowed during the proceedings.[73]

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[67] Lega-Bartoccetti, *Commentarius in Iudicia Ecclesiastica* (Romae, 1950), vol. 2 at 713.

[68] Wu Zhong Lin, *Psychology of Witnesses*, (Chendou: Shichuan University Press, 1987) at 91-92.

[69] *Ibid.*

[70] Le Guo An, *et al*, *Psychology of Wintnesses* (Beijing: Press of University of Chinese Public Security, 1987) at 50.

[71] *Ibid.*

[72] Luo Da Hua, *supra*, n. 65 at 52.

2. Refreshing Memory

In principle, testimony should be given in narrative form without aid of notes. This rule, however, is not strictly adhered to. In instances when the testimony of a witness involves some figures and accounts which are hard to remember offhand, the witness may be allowed to consult notes which he has in his possession.[74] Such a note must be presented to the court upon request. The underlying reason for this caution is that a prepared statement may not be the true expression of the will of a witness but rather that of one intending to commit perjury or it may represent the reflections of one of the interested parties.[75] It is also submitted that the aid of notes is not limited to situations involving figures, it should also include other documents and data that might be consulted by the witness, e.g. excerpt of a report, letters.[76]

In addition, when it appears to the court that a witness's present recollection has been exhausted, triggering devices can be used to help restore the memory. In practice, a frequently adopted method is to ask the witness to repeat the incident several times. After such repetitions, if witnesses still lack the concerning memory, or their testimony given long after the event is uncertain or confused, a triggering device relating to the transaction may be introduced.[77] The triggering device can be directly or indirectly associated with the event in question.[78]

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[73] *Ibid*, at 53.

[74] Wang Guo Qing, *Assessment of Criminal Evidence* (Beijing: Masses Press, 1985) at 97-101.

[75] *Ibid*.

[76] Wu Zhong Lin, *supra*, n. 68 at 158.

Another method of refreshing the memory of a witness often employed is to bring the witness to the scene where he or she experienced the occurrence of the incident and to ask the witness to give evidence there.[79] This is usually an effective method as presence in the same environment may help revive the witness's recollection of the omitted or forgotten matters of a case.[80]

3. Prior Statements of Witnesses

There is hardly any rule in this regard in Chinese inquisitorial proceedings. Because of the active role of the judge at trial, the judge is able to freely evaluate all evidence without procedural interference. The use of witnesses' statements previously given to support or attack their truthfulness is solely in the judge's discretion.[81]

In practice, the usual condition for use of the prior statement is that the court finds substantial contradictions between the witness's prior testimony and the testimony given presently in court.[82] If so, the judge should read the relevant section of the prior deposition of the witness in open court and ask the witness to reconcile the conflicting testimony.[83]

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[77] Fu Kuang Zhi, *supra*, n. 64.

[78] Wu Zhong Lin, *supra*, n. 68 at 159.

[79] Wang Gang Xiang, *Theory and Exercise of Criminal Evidence in Criminal Proceedings* (Shanghai: Institution of Shanghai Social Science Press, 1987) at 162.

[80] *Ibid*.

[81] Ge Fong, "Significance and Application of Witnesses' Testimony" (1983) 1 Jurisprudence 286 at 296-297.

[82] Fu Kuang Zhi, *supra*, n. 64 at 41.

The prior statement of the witness includes his or her testimony recorded during the initial police inquiry or at the pretrial examination, and testimony given in court prior to the present deposition.[84] It is also to be borne in mind that the prior deposition disclosed in court may either be a consistent statement in support of the truthfulness of a fact and the credibility of the witness, or be an inconsistent statement for attacking the trustworthiness of a specific fact.

4. Evidence as to Credibility

In a Chinese criminal trial there is no express prohibition against introduction of evidence bearing on witnesses' credibility. It appears that it is left to the trial judge to exercise discretion as to the admissibility of such evidence.[85] The basic criteria for such determination is the "materiality" and the "rational inference" that this sort of evidence bears on the issues in question.[86]

It must be pointed out that Chinese courts deal with the use of evidence as to credibility from the relevancy perspective: when a witness testifies the material issues, there is a greater likelihood that the judge will allow questions casting doubt on the witness's credibility.[87] From this standpoint, evidence of specific instances of conduct indicating the lack of veracity is not subject to a hard and fixed line. For example, evidence that a witness had once stolen private property may be considered as too distant to be admitted; while evidence that the witness has been convicted of perjury may well be permitted by the court for weighing the testimony of the witness.

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[83] Ge Fong, *supra*, n. 81.

[84] *Ibid.*

[85] Shong Shi Jie, *Evidence in Criminal and Civil Processes* (Changsha: Hunan People's Press, 1988) at 101; Zhang Zhi Pei, *supra*, n. 63 at 215-216.

[86] Zhang Zhi Pei, *supra*, n. 63 at 236.

A COMPARATIVE VISION

The process of examination of witnesses in Canada and China shows clearly how the two modes of trials impact on their use of evidence respectively. The complexity of evidentiary rules in Canada originated from the jury trial, in which some evidence was excluded to keep the jury from distraction and misunderstanding. Later these rules applied to the judge alone as well, because cross-examination requires a presiding judge to prevent the admission of unduly prejudicial or confusing evidence at trial.[88] Therefore, certain evidence such as the one tending to show the bad character of the accused when he is examined as witness cannot be put in. To the contrary, in China where the professionally trained judge sits with jurors to decide both the factual and the legal issues of the case, there is no fear of misleading of the jurors. Consequently almost all questions can be put to witnesses and any related evidence can be introduced.

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[87] This analysis is largely based on the discussion by M.A.Mendez, "The Civil Law and Common Law: Differing Approaches to Some Aspects of Credibility" (1984) 20 Stan. J. Int'l L. 1, when the author discusses the rationale of civil law in employing character evidence in note 188 at 41-42.

Also see Xu Yi Chu and Xiao Xian Fu, *Basic Knowledge on Criminal Evidence* (Beijing: Law Press, 1983) at 105-106.

[88] *Boardman* v. *DPP* (1975), 60 Cr. App. R. 165, 170, 182 (H.L.).

On the other hand, the highlighted distinction between party-presentation in Canada and nonparty-presentation in China at trials contributes to the difference in evidentiary rules in both countries. In Canada the sequence of direct examination and cross-examination requires formal procedural rules and fixed evidence rules. In China no such sequences exist and there are no "witnesses for the prosecutor" or "witnesses for the defense". The presiding judge is obliged to conduct the factual investigation of the case and thereby possess the power to access all evidence. The extensive control over the trial by the judge places the examination of witnesses in the hands of the judge rather than according to formulated procedural rules. This results in the rather flexibile use of evidence.

Based upon the two above points, it is not surprising that the examination of witnesses in Canadian courts is governed by bewildering complexity of evidentiary rules. Canadian lawyers would search in vain for similar rules in Chinese courts.

However, the differences as to procedural rules and evidentiary rules between the two systems must not be overstated. Notwithstanding the contrast between the Canadian complexity of evidentiary rules and the absence of such rules in China, similarities can be observed as well. Both kinds of trials have the same aim of reaching the truth. This requires the examination of witnesses as an indispensable device of arriving at the goal. Therefor the examination of witnesses in both countries inescapably bears some points in common. Although lacking an express network of evidence rules, Chinese law does have, for the purpose of conducting the examination of witnesses, both rules as well as practices that can be regarded as rules of evidence. It is this fact that makes the search for the similarities in the two modes of trials possible.

A. Rules as to Leading Questions

It is clear that both countries prohibit leading questions in their trial proceedings for the same purpose of obtaining the real facts. It is also evident that both systems regard this rule of prohibition as relative and flexible. Trial judges in both proceedings are able to determine whether leading questions in individual cases may be used according to the particular circumstances.

Nonetheless, a few differences should be noticed. First, leading questions are prohibited only in direct examination in Canada. In China, because of the absence of sequences of examination and the "prosecutor witnesses" or "defendant witness", leading questions are generally barred throughout the proceedings. There are no formulated rules governing when or at what stage leading questions are permitted or not.

Second, there is no mention or discussion in China on whether leading questions may be used to refresh the memory of a witness after repetitions of the incident failed effect. Case law in Canada has expressly recognized such use.

It is evident that, from the comparison, the Chinese law is not as strict as Canadian law in setting forth particular rules as to leading questions.

B. Rules as to Refreshing Memory

Both countries recognize the necessity of refreshing memory in the examination of witnesses. When the recollection of a witness is defective as to the incident, a triggering device such as writings, sound and so forth associated with the event can be adduced to revive the witness's memory.

However, it is obvious that, despite the common recognization in the two systems, rules as to refreshing memory in Canada are more complicated and definite. The most distinctive aspect is the classification as to "present memory revived" and "past recollection recorded" in Canadian courts. The difference between the two categories affect their usage as evidence at trials. Briefly, "past recollection recorded" may be used as evidence if it failed to bring back the memory of the witness as to the transaction. Accordingly, Canadian case law has developed certain standards for "past recollection recorded" to meet if it is to be used as evidence.

To the contrary, there is a complete absence as to rules in this regard in China. Whether to use the revived memory of the witness or a triggering device as evidence is left to the discretion of the examining judge.

C. Rules as to Credibility of Witnesses

Although no formal evidentiary limitations on credibility of witnesses exist in China, as compared to the complex network of such rules in Canada, the distance between the two systems in this regard is in fact not so great. Devices leading to the exclusion of evidence as to credibility were developed in China so that not all relevant evidence is automatically admissible. These devices may be disguised by different labels or, may be, as characterized by M.Damaska: "exclusionary side-effects of procedural rules designed by continental law to achieve other purposes."[89]

In China, the power of the examining judge to decide the use of evidence sometimes leads to, although seldom defined with precision by written law, the exclusion of evidence even though it is logically relevant and there are no express exclusionary rules on point.[90] For example, the court may not hear the character evidence of the witness if it is already thoroughly convinced of the factual proposition the party propose to prove.[91] Therefore, many items of evidence as to credibility which are not permitted in Canadian courts, such as the good character of a witness relating to the certainty of the truth in question, will not be admissible in Chinese courts as well.

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[89] M.Damaska, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study" (1972-1973) 121 U. Pa. L. Rev. 506 at 516.

Another device asserting exclusionary effect in a Chinese court is the rule as to "primary evidence" and "secondary evidence".[92] The court is required to base its decision in the case solely or primarily on "primary evidence" and "original evidence" because they are more probative than the secondary evidence.[93] In other words, despite the absence of character rule and rules of prior statements, this, as said:

> does not mean that character evidence, though admissible in principle, may be used as bases for a conviction where better evidence is available. On the contrary, the clarifying duty of the judge...requires him to adduce on his own motion the

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[90] *Ibid.*

[91] Zhang Zhi Pei, *et al*, *supra*, n. 63 at 327-328.

[92] In China, evidence that is directly probative of the issues raised by the case is regarded as primary evidence. For example, the testimony of witnesses as to their direct visual or auditory experience of the killing of a person is classified as primary evidence.

Evidence that is indirectly probative of the issues raised by the pleadings is classified as secondary evidence. Such evidence mostly takes the form of real evidence or evidence as to credibility.

See Zhang Zhi Pei, *et al*, *ibid* at 230-237; Fang Chong Yi, *supra*, n. 64 at 178-182.

Also see Mendez, *supra*, n. 87 note 188 at 41:

> The division of evidence into primary and secondary categories corresponds generally with the common law's distinction between evidence offered to prove or disprove the credibility of witnesses.

[93] Zhang Zhi Pei, *et al*, *ibid*; Fang Chong Yi, *ibid*.

accessible better evidence that shines through the second best evidence.[94]

Although this was wisdom regarding Germany criminal procedure, this writer is of the opinion that the above passage applies to the Chinese process of criminal trials as well, for it is an inquisitorial variant. Therefore, some evidence, including that of credibility, even though relevant, will be refused by a Chinese courts if sufficient primary evidence is available to reach the truth. Considering the numerous rules with respect to the exclusion of character evidence in Canadian courts, the gap between the two systems on the issue of admitting evidence as to credibility is not as wide as it appears at first blush.

Additionally, the underlying perspective of relevancy as to admissibility of character evidence in China plays an indispensable role in excluding such evidence. As said already, unlike the common law, which attempts to limit evidence on credibility by numerous rules, the Chinese law deals with the issue on the bases of relevancy and materiality. The examining judge exercises discretion whether character evidence is relevant or important to the issues in the case and, if not, such evidence should not be permitted. As a result, much evidence as to credibility, regarded as doubtful relevancy, may be excluded by the presiding judge. Therefore, although Chinese law, unlike Canadian law, contains no express prohibition against introduction of these kinds of evidence, it may be that, as a *practical* matter, it is more restrictive sometimes than the Canadian law in this regard.

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[94] K.H.Kunert, "Some Observations on the Origin and Structure of Evidence Rules Under the Common Law System and the Civil Law System of 'Free Proof' in the German code of Criminal Procedure" (1966-1967) 16 Buff. L. Rev. 122 at 152.

However, it is important to bear in mind that the distinction of evidentiary rules as to the inquiry of witnesses in the two countries is primarily reflected in the different attitudes toward the use of character evidence. In Canadian courts, numerous specific rules have been developed to bar or limit the introduction of such evidence. The array of these rules is bewildering: the prior inconsistent statements of one's own witness is prohibited unless the witness is proven adverse (let alone the requirement of proving adversity); evidence of bad character of the accused and the primary victim of sexual assault is not admitted; evidence of good character is barred unless exceptional circumstances emerge, etc. In contrast, Chinese courts admit all character evidence relating to witnesses: prior consistent and inconsistent statements of both sides; good and bad character evidence of the witnesses. There is no required sequence or conditions as to the use of such evidence. Instead of being bound by settled rules, Chinese judges are at liberty, if they see the logical relevancy of the character evidence to the truthfinding, to consider such evidence at trial.[95]

D. Suggestion for Improvement

Based upon the comparison of the two systems as to the examination of witnesses, some suggestions can be offered with a view to improving both systems in this area.

On the Chinese side, this writer accedes to the idea that, to reach a complete evaluation of evidence, the active role of the presiding judge should be helped with appropriate cross-examination.[96]

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[95] Mendez, *supra*, n. 87; Damaska, *supra*, n. 89 at 528-529.

It is suggested by some continental jurists that, although cross-examination is subject to the defect of unpleasant aggressiveness of the interrogation, it is nonetheless exceptionally useful in extracting the truth.[97] Legal training by itself does not necessarily enhance a judge's ability to determine whether a witness is mistaken or biased. Cross-examination can efficiently help expose possible perceptual flaws, bias or lack of knowledge on the part of witnesses.

Accordingly, party-examination may be appropriate with the judge permitting only supplemental questions to guarantee the completeness, the clarity and the correctness of the results.[98] In Germany, for instance, the parties can be permitted to examine witnesses on areas not covered by the judge.[99] Such a limitation is rigid because vigorous party examination may suggest to the judge that he failed to do a satisfactory job.[100] It seems to this writer that this method would be desirable in Chinese criminal trials.

As a consequence of adopting cross-examination, some specific rules guiding the use of evidence should be built up. It is clear that, from a comparative point of view,

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[96] W.Zeidler, "Evaluation of the Adversary System: As Comparison, Some Remarks on the Investigatory System of Procedure" (1981) 55 The Australian Law Journal 390 at 397; also Mendez, *supra*, n. 87 at 37-41; H.Jescheck, "Principles of German Criminal Procedure in Comparison With American Law" (1970) 56 Va. L.Rev. 239.

[97] Jescheck, *ibid* at 250.

[98] B.Kaplan, et al, "Phases of German Procedure I" (1958) 71 Harv. L. Rev. 1193 at 1234-1235; Mendez, *supra*, n. 87 at 40.

[99] Kaplan, *ibid*.

[100] *Ibid*.

Canadian law is more definite and precise in both its statutory and judicial decisions with respect to evidentiary rules during examination of witnesses. It would be beneficial for the Chinese law to take reference from the Canadian instance. However, this does not mean that cross-examination in China must follow the common law in its bewildering rules limiting the impeachment and accreditation of witnesses.[101]

Turning to the Canadian side, it is noticeable that the common law rules of evidence guiding the examination of witnesses are complicated and confusing. As warned by Maguire:

> false assumption -- namely, that in a trial all evidence which is relevant, which has a logical tendency to establish one way or another the contested issues of fact, is going to be admitted for consideration of the trier of fact. Instead, the real truth is that courts and legislatures,...have over the years made up many rules for excluding from trials a great deal of relevant evidence. Operating these rules has kept judges and lawyers and law professors so fully occupied that they have not yet satisfactorily explored the important questions of evidential cogency. They have been too busy deciding what should be kept out to make, much less teach, systematic appraisal of what they let in. So evidence has to do with exclusion rather than evaluation.[102]

Wigmore also criticizes the complexity of evidentiary rules that "serve, not as needful tools for helping the truth at trials, but as game-rules, afterwards, for setting aside the verdict."[103]

The bewildering array of evidentiary rules in Canada as to examination of witnesses should be trimmed and reformed for the purpose of searching for truth. This may be achieved by leaving the admissibility of such evidence to the trial judge's discretion, instead of subjecting the judge to the bounds of fixed rules.

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[101] Mendez, *supra*, n. 87. The author suggests that civil law needs to provide parties with opportunities to test the reliability of their adversary's evidence. This goal, however, can and should attained without the abundance of complex and frequently bewildering rules that have marked the common law's approach to credibility.

[102] Maguire, *Evidence - Common Sense and Common Law* 10 (1947).

[103] 1 *Wigmore on Evidence* s. 8c.

CHAPTER V

OPINION EVIDENCE AND HEARSAY EVIDENCE

Opinion evidence rules form an important part of evidence law in both Canada and China. Taking different approaches to the treatment of opinion evidence, the two systems display a rich ground for potential improvement on this issue. The purposes of this chapter are to examine the general rules as to opinion evidence in the two countries, and to provide some observations on potential reforms to each system.

Another purpose of this chapter is to look at the hearsay rule under the two systems. In Canada, the hearsay rule occupies a major segment of evidence law whereas there is hardly any such rules in China. A comparison as to hearsay evidence is necessary for a thorough understanding of how each system differes. Perhaps, with a recognition of their respective defects, both systems would find reasons for improvement.

It is to be noted that, due to the complexity of the exceptions to the hearsay rule at common law and the length of this thesis, only several recently developed exceptions will be illustrated in this chapter. Therefore, it is important to bear in mind at the outset that common law has a long list of hearsay exceptions and this list is not closed.

CANADA

A. The Opinion Rule

1. Expert Evidence

When discussing the character of expert testimony and the necessity for its use, McCormick states:

> To warrant the use of the expert testimony, then, two elements are required. First, the subject of inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average laymen. Second, the witness must have sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth.[1]

To admit expert evidence, a trial judge is required to determine the experiential capacity of the witness[2] as well as the helpfulness of such expert opinion to the trier of facts. With respect to the standard of a scientific expert's helpfulness, it had been said:

> ... courts will go a long way in admitting expert testimony deducted from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained *general acceptance in the particular field in which it belongs*.[3]

This "general acceptance" test has, however, been deemed too strict. A new approach - relevancy and reliability critera has, therefore, been suggested in the United States. McCormick states:

Any relevant conclusions which are supported by a qualified expert witness should be received unless there are other reasons for exclusion.[4]

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[1] McCormick, *Evidence* (2d ed) at 29.

[2] *Preeper* v. *R.* (1888), 15 S.C.R. 401.

[3] *Frye* v. *U.S.* 293 F. 1013, 1014 (D.C. 1923).

A party adducing expert evidence is responsible for ensuring a degree of reliability of such evidence.[5] Moreover, in regard to the novelty of a new technique that has no established "track record" in judicial trials, several methods are available to help ascertain the reliability of such technique. For example, specialized literature dealing with the technique may support the reliability of the evidence.[6] The relevancy/reliability approach has found favour in Canada as well.[7]

Although some earlier cases illustrated that the courts often permitted opinion evidence on the very point that the jury had to decide,[8] an ultimate issue rule came into existence in the nineteenth century. It held that opinion evidence was inadmissible because it constituted an opinion upon the very point which the jury had to decide, or the giving of opinion evidence which usurped the function of the jury.[9] This rule, however, is to be construed narrowly. That is, opinion evidence is not barred unless it involves "ultimate issues" of mixed question of fact and law. The application of a legal standard is to be decided by the jury who, following the instructions of a judge, are at least as capable of applying the standard as the witness.[10] Therefore, to apply a broader formulation of the "ultimate issue rule" is unjustifiable since it would exclude opinion evidence which is necessary and helpful to a jury. Delisle discusses the doctrine as follows:

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[4] *Supra*, n. 1 at 491. Also see cases: *Kruse* v. *State*, 483 So, 2d 1383 (Fla. 4th DCA 1986); *United States* v. *Downing* 753 F.2d 1224 (3d Cir. 1985); *Andrews* v. *State* 533 So. 2d 841 (Flo. 5th DCA 1988).

[5] *Andrews* v. *State*, *ibid*, at 1386.

[6] Besides, three factors are suggested as having bearing on the reliability of evidence resulted from a new technique: its relationship to more established modes of scientific analysis, the qualifications and professional stature of expert witnesses; and the nonjudicial uses to which the scientific technique are put. *Downing*, *ibid*, at 1238-1239, citing 3 J. Winstein & M.Berger, *Weinstein's Evidence* s. 702 [03].

[7] *R.* v. *Beland and Phillips* (1987), 60 C.R. (3d) 1 (S.C.C.).

[8] *Beckwith* v. *Sydebotham* (1807), 170 E.R. 897; *Fenwick* v. *Bell* (1844), 174 E.R. 825.

[9] *North Cheshire & Manchester Brewery Co.* v. *Manchester Brewery Co.* (1899), A.C. 83, 85; *R.* v. *Wright* (1821), 168 E.R. 895, see 7 Wigmore, *Evidence* (Chad. rev.), s.1921, note 1.

> A broader formulation of the ultimate issue rule foreclosing other opinion testimony, over and above opinions respecting guilt or innocence, not only lacks justification but, in theory, is unworkable. The doctrine of relevance and materiality dictates that *all* evidence given at a trial must be with respect to matter that are *necessary* to the prosecution or defence of the matter at issue. All testimony is then with respect to an ultimate issue in the sense that failure of proof with respect to anything necessary to a successful prosecution must yield an acquittal. In theory, no expert, bound by the rules of relevancy and materiality, would be permitted to testify to *anything* under a broad formulation of the ultimate issue rule. In practice, of course, expert opinion testimony is received and the supposed ultimate issue rule which developed in the nineteenth century is seen, to be kind, as amorphous, and, is applied or withheld with a great deal of discretion.[11]

In Canada, the "ultimate issue rule" is restrictively applied. In *R.* v. *Graat*[12], the Supreme Court concluded:

> In Canada the ultimate issue doctrine may now be regarded as having been virtually abandoned or rejected. Where evidence has been rejected on the basis of the doctrine, such rejection can be explained on other grounds. In some instances the opinion evidence should be rejected because the trier of fact, whether Judge or jury, is just as well qualified as the witness to draw the necessary inference. Accordingly, the non-expert testimony is superfluous, as it is of no appreciable assistance to the Judge or jury ... In the final analysis, even with the benefit of the expert's evidence the jury still has to make the final determination of the issue, so that the expert is not really usurping the jury's

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[10] *Grismore* v. *Cousol. Products Co.* 5 N.W. 2d 646, 663 (Iowa, 1942); also *R.* v. *Fisher* (1961), 34 C.R. 320, 342 (Ont.C.A.) per Aylesworth.

[11] R.J.Delisle, *Evidence: Principles and Problems* (2d. ed.) (Toronto: Carswell, 1989) at 463.

[12] (1980), 55 C.C.C. (2d) 429 (Ont. C.A.); affirmed (1982), 2 C.C.C. (3d) 365 (S.C.C.).

function.

It is to be noted that opinion based upon data in books of recognized authority are receivable. The reason is provided by Wigmore:

> No one professional man can know from personal observation more than a minute fraction of the data which he must every day treat as working truths. ... [Otherwise to rule it inadmissible] would be to ignore the accepted methods of professional work and to insist on cynical and impossible standards.[13]

2. Non-expert Opinion

An expert's opinion evidence is admissible, though she has no personal knowledge about the events of the case, because the matters to which she testifies involve some science or profession which is beyond the ken of the jury. For a lay witness, if she possesses personal knowledge of the event, she can give her opinion testimony if the judge sees it as helpful to the jury.

The justifications of the reception for lay opinion evidence are two-fold. First, it is impossible to testify only to facts but not to opinion. As O'Halloran J.A. ruled in *R.* v. *Miller*:

> When a witness says he saw or heard something, it truly means that he thinks or believes he saw or heard what he describes. In the result, everything a witness says becomes a personal judgement. In another sense nothing truly becomes a 'fact' until the judge or factfinding tribunal finds it to be a fact after deliberating upon the varying or conflicting statements by witnesses who can do no more than say what they think or believe, even if they do not preface what they say by 'I think', 'I believe' or equivalent qualifying language.[14]

Another justification is based on Thayer's principal premise: what is probative is receivable unless excluded by a rule or principle of law.[15] If a witness testifies to facts, inferential and conclusory terms as to these matters may be used. It is unreasonable to say that a common person can not form an opinion from the common sense of his or her experience based on daily life. If the witness' opinion is relevant to the issues of a case, there is no reason, according to Thayer's principle, to exclude such opinion evidence.

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[13] 2 Wigmore, *Evidence* (Chad. rev.) s.665b. See also cases cited in Delisle, *supra*, n. 11 at 464-469.

[14] (1959), 29 W.W.R. 124 (B.C.C.A.).

In determining the receivability of a layman's opinion, the trial judge should measure the helpfulness of such evidence to the jury. If the trier can not in the circumstances draw the inference, the witness's statement of inference or conclusion will help the jury without wasting time.[16]

B. The Hearsay Rule

1. Introduction

Hearsay is defined as evidence based on the reports (oral or written) of others rather than on a witness's own knowledge. Such evidence, at common law, is generally inadmissible unless it falls within a recognized exception. The line distinguishing hearsay from non-hearsay is stated by Justice MacDonald:

> Essentially it is not the form of the statement that gives it its hearsay or non-hearsay characteristic but the use to which it is put. ... If, therefore, the relevance of the statement lies in the fact that it was made, it is the making of the statement that is the evidence - the truth or falsity of the statement is of no consequence; if the relevance of the statement lies in the fact that it contains an assertion which is, itself, a relevant fact, then it is the truth or falsity of the statement that is in issue. The former is not hearsay, the latter is.[17]

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[15] Thayer, *Preliminary Treatise on Evidence* (Boston: Little, Brown, 1898) at 265.

[16] *Graat* v. *R.* (1982), 31 C.R. (3d) 389 (S.C.C.).

[17] *R.* v. *Baltzer* (1974), 27 C.C.C. (2d) 118, 143 (N.S.C.A.).

It is to be noted that conducts or actions which are intended by the actor to be assertions may also be characterized as hearsay.[18]

The underlying justification of the hearsay rule is the concern with respect to the veracity of the statements made. The principal justification is the abhorrence of the common law for proof which is unsworn and has not been subjected to cross-examination. An additional reason for the rule is the fear that jurors will be incapable of evaluating the weight to be given to hearsay statements.[19]

2. Exceptions

1) Introduction

The hearsay rule cannot and should not be absolute. By the 19th century many exceptions had become well established. However, two different approaches have been taken by English and Canadian courts. The English Courts in the 20th century have been reluctant to create new exceptions to the hearsay rule, viewing this as the task of the legislature.[20]

However, Canadian courts have adopted a more liberal approach established by Wigmore in expanding the exception list. According to Wigmore, exceptions are justified upon twin principles of necessity and the guarantee of trustworthiness. In cases where the declarant is unavailable, it is necessary to employ hearsay, for it is the only source of evidence. Nevertheless, in the absence of cross-examination and oath truthfulness, necessity alone can not justify the reception of hearsay unless it is accompanied by another factor - a circumstantial guarantee of trustworthiness. If a statement was made in a situation where "even a sceptical caution would look upon it as trustworthy, in high degree of probability, it would be pedantic to insist on a test whose chief object is already secured."[21] Therefore, if such a guarantee of trustworthiness exists, the hearsay may be accepted.

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[18] *Chandarasekera* v. *R.* (1936), All E.R. 865 (P.C.).

[19] E.g. J.D.Haydon, *Cases and Materials on Evidence* (London: Butterworths, 1975) at 312.

[20] *D.P.P.* v. *Myers* (1965), A.C. 1001 (H.L.); *R.* v. *Blastland* (1986), A.C. 41 (H.L.).

Moreover, Wigmore indicated that, in some cases, the circumstantial guarantee of trustworthiness is considered to be so strong that the necessity principle need not to be complied with, i.e. despite the availability of the witness, the hearsay would be admissible.

Clearly, Wigmore's approach justified the creation of a new exception so long as the criteria of necessity and reliability are met. This conception of newly created exceptions has developed in Canada,[22] especially with respect to statements of young children.

In *R.* v. *Khan*,[23] it was ruled that necessity means unavailability of direct evidence or inability of the witness to testify. This surely expanded the list of reasons for necessity: unlike the approach of the English courts, which is fixed on death, incompetence to testify can lead to the reception of hearsay in Canada. Furthermore, in

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[21] 5 Wigmore, *Evidence* (Chad, rev.) s. 1420.

[22] For example, statements against penal interest is now viewed as new exception to the hearsay rule. *R.* v. *O'Brien* (1977), 76 D.L.R. (3d) 513.

[23] (1991), 59 C.C.C. (3d) 92 (S.C.C.).

College of Physicians and Surgeons v. *Khan*,[24] the court held that necessity may arise in circumstances where the child is unable to testify in the full detail that is revealed in the statement.

With respect to reliability, the *Khan* case ruled that a relatively spontaneous statement made by a young child in response to a non-leading question shortly after the event was some evidence of reliability. The child was seen as having no motive to falsify her story, which emerged naturally and without prompting. Moreover, the fact that the sexual act put on her was beyond her ken enhanced the reliability.

In *R.* v. *Steven*,[25] it was ruled that a young child's statement given *two weeks* after the event, emerging from a non-leading question, was admissible. Children of tender years may not understand the implications of a sexual act, or may react with shock; in either event it results in delay in reporting, or not reporting at all.[26]

The approach in *Khan* was confirmed by the Supreme Court in *R.* v. *Smith*[27] and *R.* v. *J.P.*[28]. The effect of these decisions has been to rapidly expand the scope of admissibility of hearsay in child sexual abuse cases.

In short, although the list of traditional exceptions remains important, it is also important to notice that changes have been made and new exceptions permitted.

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[24] Unreported, Sept. 1991 (Ont. C.A.). But see a contrary decision in *R.* v. *Aquilar* (1992), O.J. No. 1825 (Ont. C.A.).

[25] Unreported, Sept. 29 1992 (Ont. C.A.).

[26] Frissell & Vukelic, "Application of the Hearsay Exceptions and Constitutional Challenges to the Admission of A Child's Out-of court Statements" (1990) 66 N. D. L. Rev. 599.

[27] Unreported, Aug. 27, 1992 (S.C.C.).

[28] (1993), S.C.J., 17 Feb.

2) *Res Gestae*

Classically, a contemporaneity test was the common law basis for admitting *res gestae*. As Phipson states:

> The declarations must be substantially contemporaneous with the fact, i.e. made either during, or immediately before or after, its occurrence - but not at such an interval from it as to allow fabrication or to reduce them to the mere narrative of a past event.[29]

This strict interpretation of contemporaneity was applied with pedantic force.[30] Wigmore suggested the excited utterance test as a modification of the contemporaneity test. If some startling incident occurs and reflectively prompts an utterance, it may be admitted as evidence. According to this formulation, the statements in *Bedingfield* would be admissible as proof of the truth of the content.

The present, modern basis for the admissibility of statements under the *res gestae* rule is the spontaneity test. In *Ratten* v. *R.*[31], it was ruled that what matters is whether, under all of the circumstances, there is an opportunity for concoction. If the statement is spontaneous, it is sufficiently reliable to be admitted. Therefore, some time lag is permissible.

What is the meaning of "spontaneous"? The cases do not provide a precise formulation. It depends upon the circumstances of each case as to whether there was time for concoction. This leads to inconsistent applications. In *Khan*,[32] the Supreme Court of Canada ruled that the victim's statement made to her mother minutes after the incident did not meet the spontaneity test because the time lag was too great. In *R.* v. *Reed*,[33] The Alberta Court of Appeal ruled, based on the decision of *Khan*, that the statement of the victim made without prompting immediately after the incident was admissible.

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[29] Phipson, *Evidence* (7th ed.) at 57.

[30] For example, in *R.* v. *Bedingfield* (1879), 14 Cox C.C. 341, the accused was seen to enter the house and a minute or two later the victim rushed out with her throat cut and screamed about what the accused had done. The exclamation was not admitted because the judge ruled the words did not accompany the action of cutting of the victim's throat.

[31] (1972) A.C. 378, 389 (P.C.); also see *R.* v. *Andrews* (1987), All E.R. 513 (H.L.); *R.* v. *Risby* (1978), 2 S.C.R. 139 (S.C.C.); *R.* v. *Graham* (1972), 7 C.C.C. (2d) 93 (S.C.C.).

3) Co-conspirators

Acts and statements of persons who are carrying out a joint unlawful venture are admissible as evidence against one another, providing the acts or statements are in furtherance of the conspiracy and not just a mere narrative of what has occurred in the past.[34] If the conspiracy is at an end the operation of the rule ends, as for example, when the conspirators have been arrested and one of them provides a statement to the police;[35] or statements to a solicitor once litigation has been commenced.[36]

This preliminary condition of admissibility presents a problem, as it coincides with the very fact sought to be proven. If the concurrence exists, it seems reasonable that the statement be received if there is some other evidence proving the existence of conspiracy. The Supreme Court of Canada has established a three-part test of conditional admissibility. That is, all evidence with respect to the conspiracy is heard without a *voir*

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[32] (1991), 59 C.C.C. (3d) 92 (S.C.C.).

[33] Unreported, March 8, 1992 (Alta. C.A.).

[34] *R.* v. *Miller* (1975), 63 D.L.R. (3d) 193, 217-221 (B.C.C.A.) re the distinction; *R.* v. *Koufis* (1941), S.C.R. 481; *R.* v. *Hook* (1975), 4 W.W.R. 759 (Alta. C.A.); *R.* v. *Rretty* (1982), 34 A.R. 313 (Alta.C.A.).

[35] *R.* v. *Henke* (1988), A.J. No. 923 (Alta. C.A.).

[36] *Ed Miller Sales & Rentals Ltd.* v. *Caterpillar Tractor*, (1988), A.J. No. (Q.B.).

dire. Then the jury is to determine: (1) whether the conspiracy has been proven beyond a reasonable doubt; (2) if a conspiracy existed, whether a probability, based on the evidence directly receivable against the accused, is raised that the accused was a member of the conspiracy; (3) if answers to the two threshold questions are positive, the jury may apply the hearsay to each, and then determine whether the conspiracy has been proven.[37]

4) Declaration in the Course of Duty

Common law declarations of a deceased person were admissible as exceptions to the hearsay rule if they were made contemporaneously with the performance of the duty and provided that the deceased had no motive to misrepresent.[38] However, since *Ares* v. *Venner*,[39] the requirement that the declarant had to be dead has not been followed. The elimination of the necessity requirement seems to flow from two elements: (1) that in many cases the cross-examination would serve no useful purpose,[40] and (2) the strength of circumstantial guarantee of trustworthiness flowing from the other requirements of the rule.

Therefore, a declaration is receivable provided it meets two elements: (1) the declarant is under the duty to do the act and under the duty to record it and; (2) the record is a part of the usual and ordinary business record of the business.

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[37] *R.* v. *Carter* (1982), 67 C.C.C. (2d) 565 (S.C.C.); *Re Ng* (1988), A.J. No. 1069 (Q.B.).

[38] *Palter Cap Co. Ltd.* v. *Great West Life Assurance Co.* (1936), O.R. 341.

[39] (1970), S.C.R. 608. In this case the nurse who made the notes, which was admitted as evidence, was present at the courtroom but not called as witnesses.

[40] *R.* v. *Sunila & Solagman* (1986), 26 C.C.C. (3d) 331 (N.B.S.C.T.D.).

There has long been a question whether double hearsay is receivable under this exception.[41] In *R.* v. *Monkhouse*,[42] it seems beyond dispute that double (triple) hearsay may be admissible if it is trustworthy. In *R.* v. *Grimba*, the Judge stated:

> It would appear that the rationale behind that section (s.30 of the *CEA*) for admitting a form of hearsay evidence is the inherent circumstantial guarantee of accuracy which one would find in a business context from records which are relied upon in the day to day affairs of individual businesses, and which are subject to frequent testing and cross-checking. Records thus systematically stored, placed and regularly relived upon should, it would appear under s.30, not be barred from this Court's consideration simply because they contain hearsay or double hearsay.[43]

In *R.* v. *Kitchen*,[44] the issue of double hearsay was raised by Kerans J.A. The upshot of his discussions is that if the factual circumstances are sufficient to guarantee its trustworthiness, double hearsay may be admissible.

An unresolved issue is whether opinion recorded in the course of duty is admissible at all. McCormick argued that to reject the use of such evidence may shut-out altogether a reliable item of proof provided its trustworthiness is guaranteed.[45] It is suggested that a flexible rule in this regard should be adopted: admissibility of opinion ought to depend upon the nature of the opinion and the circumstances of each case.[46]

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[41] For example, in *Adderly* v. *Bremner* (1968), 1 O.R. 621 (H.C.), the business records tendered included the plaintiff's history recorded on plaintiff's admission to hospital and were not admitted. While in *Re Maloney* (1971), 12 R.F.L. 167 (N.S.Co.Ct.), the court permitted a social worker's record made during the interview with another person.

[42] (1988), 55 Alta.L.R. (2d) 97 (C.A.).

[43] (1977), 38 C.C.C. (2d) 469, 471 (Ont. Co. Ct.).

[44] (1986), 68 A.R. 85 (C.A.).

[45] McComick, *Evidence* (1972) at 41-42 and 721-722.

[46] J.Robb, *Materials on the Evidence Course* (Mar. 15, 1993), (unpub.) at 183-185.

5) Expert Evidence

If an expert forms his opinion upon out-of-court statements made to him which he uses for practising his expertise, the opinion he gives, according to orthodox views, was not admissible. It was ruled that hearsay itself was unacceptable because of lack of cross-examination in court, therefore it was meaningless to consider the opinion evidence based upon hearsay.[47] However, some contrary decisions have been made by the Supreme Court of Canada. In *R. v. Wilband*,[48] the opinion testimony, partly based on the prison files containing such relevant second-hand materials as another psychiatrist's report, was admissible. In *R.* v. *Lupien*,[49] the psychiatric opinion which was based on interviews with the defendant prior to trial, was admitted. The core of these decisions is that opinion evidence, though based on hearsay, was nevertheless receivable; the hearsay aspect affects only the value of the opinion but not the receivability in evidence of the opinion.[50]

It is firmly established in Canadian law that hearsay is admissible through an expert, not as proof of the content of the statement, but to establish the basis of the opinion.[51] However, the Supreme Court of Canada's decision in *R.* v. *Lavallee*[52] has potentially expanded the scope of hearsay through experts. It was ruled that the information upon which the expert opinion relied heavily, could be used testimonially as proof of the truth of the contents. As long as there is *some admissible evidence to establish the foundation*, the jury is to be cautioned as to weight, but not told to ignore the testimony in terms of truthfulness.

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[47] *R.* v. *Ahmed Din* (1962), 46 Cr. App. R. 296; *R.* v. *Arbuckle* (1967), 2 C.C.C. 32 (B.C.S.C.); *R.* v. *Turner* (1975), 60 Cr. App. R.

[48] (1967), 2 C.C.C. 6 (S.C.C.).

[49] (1970), S.C.R. 263, 265.

[50] However, see *R.* v. *Abbey* (1982), 29 C.R. (3d) 193 (S.C.C.), the Supreme Court of Canada seemed unclear on this issue. See also Delisle, *supra*, n. 11 at 477-479.

[51] *R.* v. *Abbey*, *ibid.*

[52] (1990), 55 C.C.C. (3d) 97 (S.C.C.).

It should also be noted that experts use well-accepted hearsay sources such as surveys and polls,[53] authoritative scientific or historical texts,[54] and ancient documents,[55] which may be used testimonially, if the expert adopts them.

6) Statements Against Penal Interest

Statements of a person who is unavailable at trial by reason of death, insanity, illness, or absence from the jurisdiction are admissible provided they are made against the declarant's interest. The justification is that, in addition to the necessity caused by the declarant's unavailability, what a person says against his interest is probably true.[56] Usually two kinds of interests are recognized: pecuniary interest[57] and proprietary interest.[58]

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[53] *Aluminum Coods Ltd.* v. *Canada* 19 C.P.R. 93; *Saint John* v. *Irving Oil Ltd* (1966), S.C.R. 581.

[54] *R.* v. *Zundel* (1987), 31 C.C.C. (3d) 97 (C.A.).

[55] *Ibid.*

[56] *Lloyd* v. *Rowell Daffryn Steam Coal Co.* (1913), 2 K.B. 130 (C.A.); *Public Trustee* v. *Walker* (1981), 122 D.L.R. (3d) 411 (Alta. C.A.).

[57] *Bradshaw* v. *Wildington* 86 L.T. 726.

[58] *Crease* v. *Barrett* (1835), 1 Cr. M. & W. 919.

However, in *R.* v. *O'Brien*,[59] the Supreme Court of Canada held that this exception would extend to a statement which would expose the declarant to criminal liability. Penal liability was treated as at least as serious to the declarant as pecuniary or proprietary interest. The Supreme Court adopted the pre-conditions stated for admissibility of statements against interest in general as stated in *Ward* v. *H.S.Ptii & Co.*,[60] which are:

(a) the statement made must be in circumstances which would make the declarant apprehend the vulnerability to penal consequences;

(b) the vulnerability to penal consequences must not be remote;

(c) the declaration must be considered in its totality -- if on balance it is in favour of the declarant, it is not against interest;

(d) the court can consider other evidence which connects the declarant with the crime.

In *R.* v. *Pelletier*,[61] a similar type of statement made to *police officers* was held to be admissible. In *R.* v. *Evans*,[62] it was held that a statement from one criminal to another is not admissible for the declarant would not have expected the recipient to expose him to criminal consequences.

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[59] *Supra*, n. 22.

[60] (1913), 2 K.B. 130 (C.A.).

[61] (1978), 38 C.C.C. (2d) 515 (Ont. C.A.).

[62] (1989), 45 C.C.C. 526 (B.C.C.A.), rev'd on other grounds 63 C.C.C. (3d) 289.

7) Former Testimony

Taylor said:

> Where a witness has given his testimony under oath in a judicial proceeding, in which the adverse litigant had the power to cross-examine, the testimony so given will, if the witness himself can not be called, be admitted in any subsequent suit between the same parties, or those claiming under them, provided it relates to the same subject or substantially involve the same material questions.[63]

The need for this exception stems from the unavailability of the witness[64]. The guarantee of trustworthiness of the previous statement is that it was made upon oath and subject to cross-examination. However, this should not to be misused: if the prosecutors are aware of a witness's pending departure they are to immediately advise the defence so that the future use of the testimony may be contemplated.[65] This is important because, while it is a prerequisite that there must have been a full opportunity to cross-examine, the fact that defence counsel, for tactical reason, did not cross-examine as they would have at trial does not mean that there has been a deprivation of that right.[66]

8) Reputation as to Non-veracity

Certain hearsay exceptions admit opinion of community reputation where relevant and considered helpful. For more reason, such opinions, based on gossip, are viewed as having higher value than those based on direct experience. Generally, a witness can not be asked to give a personal opinion on the credibility of another witness.[67] However, it is always possible for an opposing party to call a witness to testify as to a previous witness's general reputation in the community for untruthfulness.[68] It is not permissible, under the guise of testifying as to general reputation, for the witness to testify as to a particular act of dishonesty. The rule relates to the witness's *reputation*, not to specific acts which would lead into endless dispute.

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[63] Taylor, *Evidence*, s.464, cited in *Town of Walkerton* v. *Erdman* (1894), 23 S.C.R. 352.

[64] See s. 715 of the *Criminal Code*.

[65] *R.* v. *Kaddoura* (1987), 41 C.C.C. (3d) 371 (Alta. C.A.).

[66] *R.* v. *Potvin* (1989), 68 C.R. (3d) 193 (S.C.C.).

9) Reputation for Good Character

Generally, a party can not bolster and support the credibility of its own witness unless the witness's character for truthfulness has been impeached.[69] However, the defence may put the good character of the accused in issue for the purpose of showing the improbability of the accused's having committed the offence and, if he or she testifies, of enhancing his or her credibility.[70]

It is to be noted that the evidence of the witness (other than the accused personally) is limited to reputation and not just personal opinion or specific instances of good conduct.[71]

Where the accused has led evidence of good reputation the Crown then may adduced evidence as to the accused's bad character.[72]

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[67] *R.* v. *Markadonis* (1935), S.C.C. 657.

[68] *R.* v. *Guneuardene* (1951), 2 K.B. 600 (C.A.).

[69] *R.* v. *Kyselka* (1962), 133 C.C.C. 103 (Ont. C.A.); *R.* v. *Burkart* (1965) 3 C.C.C. 210 (Sask. C.A.).

[70] *R.* v. *Bellis* (1965), 50 Cr. App. R. 88; *R.* v. *Tarrant* (1982), 63 C.C.C. (2d) 385 (Ont. C.A.).

[71] *R.* v. *Demyen* (No. 2) (1976), 31 C.C.C. (2d) 383 (Sask. C.A.); also *R.* v. *Close* (1982), 137 D.L.R. (3d) 655 (Ont. C.A.).

10) Prior Inconsistent Statements

By the traditional rules of hearsay, prior inconsistent statements, not having been subjected to cross-examination at the time when they were made, are receivable not for their truth but for the purpose only of showing that they were in fact made. Unless the content of the statement is adopted by the witness while testifying, the statement is not substantive evidence of its truth, but goes only to credibility.[73]

It is to be noted that there have been significant changes permitting substantive use of more previous statements.[74] In *R.* v. *K.G.B.*,[75] the Supreme Court of Canada held that a videotaped statement may be admitted *testimonially*, notwithstanding that the witness on the stand has repudiated the statement. The prerequisite is that the court must be satisfied that there is sufficient circumstantial guarantee of reliability of the statement. That is where: (i) the statement is made under oath or solemn affirmation following a warning as to the existence of sanctions and the significance of the oath or affirmation, (ii) the statement is videotaped in its entirety, and (iii) the opposing party, whether the Crown or the defence, has a full opportunity to cross-examine the witness respecting the statement, there will be sufficient circumstantial guarantees of reliability to allow the jury to make substantive use of the statement.

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[72] *Morris* v. *R.* (1979), 1 S.C.R. 405; J. Robb, *supra*, n.46 (Mar. 24, 1993) at 204.

[73] *Deacon* v. *R.* (1974), 89 C.C.C. 1 (S.C.C.); *R.* v. *Campbell* (1977), 38 C.C.C.(2d) 6 (Ont. C.A.).

[74] *McInroy and Rouse* v. *R.* (1978), 42 C.C.C. (2d) 481, 496 (S.C.C.) per Estey; See Delisle, "Comment" (1978-1979), 21 Crim. L.Q. 162. See generally, 3A Wigmore *supra*, n.21, s. 1018.

[75] (1993), 1 S.C.C. 740. Also see S. Lee, "Admitting Prior Inconsistent Statements for Their Truth" (1992) 72 Can. Bar Rev. 48.

CHINA

A. The Rule of Opinion Evidence

1. Expert Opinion

In China, the expert witness is distinguished from ordinary witnesses as follows:

a. Ordinary witnesses are chosen by circumstance and their personal observations cannot be replaced. Experts, on the other hand, can be chosen based on how qualified they are to give evidence.[76]

b. Witnesses are obligated to testify regardless of their wishes, while experts have the right to refuse to testify.[77]

c. Experts are entitled to review the case dossier and to apply for additional information if necessary. Moreover, experts are entitled to be present at the interrogation stage and to put questions to those examined.[78] Ordinary witnesses do not enjoy these procedural rights.

In Chinese adjudication, the court, not the parties, has the responsibility to determine whether an expert is to be called. This may be done on the court's own motion;[79] or on the application of the prosecutor or the defendant. In the latter instance, the ultimate decision of whether to call an expert rests fundamentally with the judge.[80] The criteria for the necessity of expert opinion is the importance of the questions to be answered for the case; the necessity of special knowledge for resolving these questions and the impossibility of resolving them in any other manner without the aid of an expert. However, if the question can be answered indisputably by means of other evidence, or even if it can be resolved simpler or more rapidly with the aid of evidence, expert opinion is unnecessary and superfluous.[81]

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[76] Zhang Li Jin, "Expert Opinion in Criminal Trials" in Zhang Zhi Pei eds. *Discussions on Issues of Criminal Proceedings in theory and in Practice* (Xian: Law Press, 1987) 96 at 99-100.

[77] *Ibid.*

[78] *Criminal Procedure Code of the People's Republic of China* trans. Chin Kim in *The American Series of Foreign Penal Codes* v. 026 (London: Sweet & Maxwell, 1985) 33 [hereinafter *CPC*], Art. 71.
Also see Wu Yi Gen, *Evidence* (Beijing: Masses Press, 1989) at 178.

The manner of appointment of experts in Chinese courts determines that experts are to be treated as impartial consultants to the tribunal. Therefore, they can be challenged by a party on grounds of partiality in the same way judges are challenged, i.e. based on family relationship, friendship, conflict of interest, etc., the judge and the expert may be rejected as possibly biased.[82]

In order to guarantee the competence of individuals chosen as experts, technical examination sections in various fields of knowledge are set up in judicial organs.[83] The persons chosen must satisfy specific legal requisites as to particular knowledge.[84]

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[79] *CPC*, Art. 88.

[80] *CPC*, Arts. 90, 117.

[81] Zhang Zhi Pei, *Textbook On Chinese Criminal Procedure* (Beijing: Masses Press, 1987) at 258-259; Zhang Li Jin, *supra*, n.76 at 105-106.

[82] *CPC*, Arts 23-25.

In analyzing the reason of challenging experts, it is said:

> Rightfully, therefore, one has occasionally referred to the expert as an 'assistant' of the court who, by reason of his activity, stands much nearer to the judicial function than any other person involved in the evidentiary process. This similarity between the positions of a judge and of an expert finds its expression most appropriately in the equal applicability of rules for rejection which govern both the judiciary and the experts.

H. Schroder, "Problems Faced by the Impartial Expert Witness in Court: The Continental View" (1961) 34 Temp. L. Q. 378 at 378.

For the appointment of experts from outside these sections, the competence of experts is guaranteed by inviting of individuals belonging to certain scientific or technical institutions. The trial conductor is required to contact the head of the institute for a recommendation of the proper expert to be designated and then, the head of the institution selects the expert and signs a contract with the trial conductor.[85]

Expert conclusions must be given in court. All participants may suggest questions to put to an expert. The questions must be publicly disclosed and the opinion of all trial participants and the prosecutorn heard concerning them.

The court is not bound to act upon expert opinion if it regards the opinion as inaccurate. If, in the opinion of the judges, an insufficient explanation of the technical or scientific questions involved has been received, or there is a serious conflict among several opinions given on the same issue, they can appoint (independent of a motion by the parties) additional new experts with the task of finishing a new report.[86] After the supplementary expert evaluation or a new expert evaluation on the same question is finished, the trial judge is to determine which opinion evidence is more convincing and accurate.[87]

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[83] Zhang Li Jin, *supra*, n. 76.

Also see *Regulations as to Criminal Technical Examination in the Public Security Department of the People's Republic of China*, Art. 3 reads:

> 3. The sections of technical experiment, set in the public security organs at and above the county level, are responsible for conducting the criminal technical examinations.

[84] For example, Art. 4 of the *Regulations*, *Ibid*, reads:

> 4. Criminal technical examination must be conducted by professional persons possessing certification of 'expert' in the respective field.

[85] Zhang Li Jin, *supra* n.76 at 108; also *Criminal Court Procedures in the Chinese People's Republic* (Washington: U.S.Joint Publication Research Service, 1961) at 105.

[86] Wang Gang Xiang, *Theory and Practice of Criminal Evidence* (Shanghai: Institution of Shanghai Social Science Press, 1987) at 218-219; Znang Li jin, *supra*, n. 76 at 116-119.

It is well recognized that, when forwarding opinion evidence, experts can give their opinion only on the specific questions to be resolved, but not on legal questions involved in the case.[88] While some legal questions may arise from the expert opinion (e.g. legal consequences may result from proof of the mental capacity of the accused, or whether the accused's capacity is "appreciably diminished"), the legal elements involved in the case are to be resolved by the trial judge.

2. Opinion of Ordinary Witnesses

The general rule is that opinions of ordinary witnesses are excluded. The underlying policy is that witnesses should only testify as to the incident or circumstances they perceived directly, and any conclusions or inferences are the province of the trial judge.[89] Therefore, if witnesses testify that they believe a fact to be true because various presumptions, conjecture and circumstantial evidence favour its truth, they are not witnesses in the strict sense of the word. Such opinion testimony can not be given any evidentiary value by the court.

However, when testifying to the facts directly perceived, a witness may be allowed to reach some opinions which reflect common sense in daily life.[90] The justification for allowing this opinion is that, at times, it is impossible to describe a fact clearly without the help of judgements as mentioned above by witnesses.[91] Moreover, it would be unrealistic to hold that an ordinary witness is unable to form an impression from common sense in ordinary life.

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[87] Zhang Li Jin, *supra*, n. 76 at 119.

[88] Wang Gang Xiang, *supra*, n. 86 at 203.

[89] Shong Shi Jie, *Evidence in Criminal and Civil Proceedings* (Changsha: Hunan People's Press, 1986) at 101; Zhang Li Jin, *supra*, n. 76 at 99.

B. The Hearsay Evidence Rule

In China, there are no specific rules with regard to hearsay evidence. Article 31 of the *CPC* simply states:

> Every fact that proves the true circumstances of a case is evidence.

According to this Article, witnesses are permitted to state what they heard others say, and there is no restriction on the probative value attributed to their testimony.[92] Hearsay evidence is not treated as a question of admissibility, rather, it is deemed an issue of evaluation.[93] The trial judge is trusted to be able, upon the circumstance of the particular case, to disregard entirely the hearsay, or give it the weight it deserves.[94]

The rationale behind this approach is the assumption that the hearsay witness may have some information to provide with regard to the fact in question or the credibility of the accused or other material persons.[95] Statements may permit an inferential approach to the facts stated in the same way as any other fact, although their value is less than that of the direct testimony.[96] Generally, no basic difference between inferential or circumstantial evidence and testimonial evidence is recognized, because reliance on testimonial evidence also involves, in the final analysis, reliance on inferences.[97]

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[90] Zhang Li Jin, *supra*, n. 76 at 99.

[91] *Ibid*.

[92] Chen Ren Hua, "Second-hand Evidence in Chinese Criminal Proceedings" (1985) 4 Law Review of Wuhan University 16 at 18.

[93] Shong Shi Jie, *supra* n. 89 at 100-101.

[94] Wu Yi Gen, *supra*, n. 78 at 106.

Thus, based upon this rationale, hearsay is admissible in principle so long as the trial judge deems it of some relevance to the case. The only exception is that documents and written depositions are excluded as evidence unless the declarants are unavailable (death, insanity, etc.).[98]

It is important to bear in mind that the non-exclusion of hearsay in Chinese courts does not imply that the danger of derivative evidence is ignored. The inferiority of hearsay is in fact well recognized in China. It is held that in the course of transmission of information from one person to another, an exact copy of such story in which the very words were accurately reported is impossible to reach.[99] Hammelmann, when dealing with the Continental treatment of hearsay, further states:

Where a witness reports the actual words which were pronounced by some third

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[95] Wang Ru Jia, *General Studies on Criminal Evidence* (Haerbing: Heilongjian People's Press, 1984) at 52. Also see generally U.Jacobson, "Hearsay Testimony in Sweden" (1973) 17 Scand. Stud. in Law 129.

[96] Fang Chong Yi, *et al*, *Chinese Criminal Procedure* (Beijing: University of Chinese Politics and Law Press, 1991) at 176-177.

[97] *Ibid*. For rationale of the acceptability of hearsay evidence, see also H. Reiter, "Hearsay Evidence and Criminal Process in Germany and Australia" (1984) 10 Monash U. L. Rev. 51 at 54-55.

[98] *CPC*, Art. 116.

[99] Chen Ren Hua, *supra*, n. 92 at 18.

> person, the text is more often erroneous than exact; the meaning of the utterance, if plain, is somewhat easier to remember, but even its approximate accuracy diminished at the inverse ratio to the removal from the original source and the time meanwhile expired, until a story which has passed through a small number of persons during a comparatively short space of time has become perfectly unrecognisable. There can therefore be no doubt that hearsay becomes unreliable evidence even if it remains in a very near degree to its original source.[100]

Therefore, a court is required to adduce accessible, better evidence that shines through the second best evidence. In other words, where the original evidence is available, a trial judge should use such original sources rather than the derivative ones.[101] Only in cases which in their very nature are difficult to prove, is hearsay admissible, provided that more competent proof from direct witnesses is not available.

According to this "best evidence rule", hearsay evidence cannot replace original evidence where it is available. Therefore, in practice a witness, in addition to the facts to which he testifies, is also to be questioned as to the source of the knowledge. It is the duty of the judge to investigate the origin of the witness's testimony; and whether the witness learned of the fact directly from a person who observed or perceived the event or only indirectly from common rumour or gossip.[102]

Where a witness refers to another person as the source of knowledge, the examining judge is obliged to call the original declarant. However, in practice it is left to the court to decide whether the "potential danger" existing in a hearsay report has become a real danger; if it has, the court has the power to call the immediate witness.[103]

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[100] H.A. Hammelmann, "Hearsay Evidence, A Comparison" (1951) 67 L. Q. Rev. 67 at 71-72.

[101] Wu Yi Gen, *supra*, n. 78 at 106; Chen Ren Hua, *supra*, n. 92 at 18.

[102] Zhang Zhi Pei, *supra*, n. 80 at 228-229.

A COMPARATIVE VISION

A. Opinion Evidence

It is obvious that the basic character of criminal procedure determines the position of expert witnesses. In the Chinese inquisitorial system, the active role of the trial judge leaves the employment of expert opinion, according to the necessity of such aid and whom to call, entirely up to the court. Experts are viewed as judicial consultants to aid in the resolution of the case. Derived from this position of experts, the standard as to qualification of experts is regulated clearly and stringently. For this reason experts enjoy considerable credit and reputation in Chinese courts.[104]

On the contrary, the Canadian adversarial system leads to the choice of the expert witnesses by the parties. The experts are, in practice if not in theory, likely to be partisan witnesses. There are no qualification floor imposed on experts. Common law courts generally take a more liberal position and require only that a witness have some knowledge or training, whether formal or informal, which is likely to be outside the experience and knowledge of the judge or jury.[105] As a consequence, experts may enjoy little credit. It has been pointed out that:

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[103] Chui Min, "Testimonial Evidence" (1990) 2 Chinese Jurisprudence 91 at 95-96.

[104] This idea is put forward by H.A Hammelmann, "Expert Evidence" (1947) 10 Mod. L. Rev. 32 at 38-39, which analyzes the high merit the continental experts enjoy. This writer is of the opinion that Chinese criminal procedures, as a variant of the inquisitorial system, also attributes to the experts high merit.

> skilled witnesses come with such a bias on their minds to support the case in which they are embarked that hardly any weight should be given to their evidence.[106]

Another striking distinction between laws regarding opinion evidence in China and in Canada is the status of experts at trials. As already mentioned, in China expert opinion is an independent evidentiary source and is treated differently from the testimony of ordinary witnesses. The rules governing the inquiry of experts and their procedural rights are accordingly different from that of ordinary witnesses.

In contrast, Canadian courts consider and treat experts as ordinary witnesses, and experts' opinions are subject to the test of cross-examination. Accordingly, the evidentiary rules guiding the use of witnesses' testimony apply to the use of expert evidence as well, e.g. the rules as to credibility of expert witnesses and so forth.

Resulting from the two above elements, it is not hard to apprehend why the network of rules as to opinion evidence in China is simpler as compared with the complexity in Canada. A convenient example is that in China, there is no concern about the admissibility of expert opinion based upon hearsay evidence, while in Canada, such evidence has long been disputed for its admissibility. Although today the rule that experts must base their conclusions only on admissible evidence is incompatible with the practice

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[105] M.M.Cohen and M.L.Hutzelman, "Interamerican Cooperation in Obtaining Testimony: The Problems of Integrating Foreign Systems of Evidence" A Comparative Study of the United States, The Federal Republic of German, and Mexico" (1981) 31 Lawyer of the Americas 211 at 227.

[106] *Tracy Peerate Case* (1843), 10 CL. & F. 191, Lord Campbell's view.

of most modern technical disciplines, in which experts rely heavily on reports, opinions, and communications of others, the discussion of the admissibility and reliability of opinion evidence upon hearsay still occupies a considerable segment of Canadian law books as well as of case law.

Another example illustrating the complexity of Canadian rules of opinion evidence is the application of all the technical issues to the examination of expert witnesses. Rules dealing with credibility play the same important role in the cross-examination of experts as that of the ordinary witnesses. An enlightening statement is worth citing here:

> While the requirement that experts testify orally is consistent with the traditional principles of common-law adjudication, it is not necessarily conductive to the determination of complex technical issues. There is little value in having the trier of fact observe the demeanour of the expert when the matter in dispute is the expert's judgement and not his or her veracity. In addition, cross-examination regarding the intricacies of such technical issues may confuse rather than enlighten the trier of fact. This may draw the trier of fact into a technical polemic which only persons well trained in the particular area of expertise could hope to understand.[107]

In contrast, Chinese judges do not have to consider any rules of evidence as to credibility at all when questioning the experts. Experts are not confined by any restrictive rules of evidence in giving their opinions.

Nonetheless, some similarity between the two systems can be observed so far as the ultimate issue rule is concerned. Both countries prohibit experts to answer questions involving legal elements such as whether the accused is innocent or guilty, which are deemed as the sole province of the jury (Canada) or the trial judge (China). Experts are bound to answer only the specific questions involving knowledge beyond the range of the jury and the presiding judge.

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[107] N.Weinstock, "Expert Opinion and Reform in Anglo-American, Continental, and Israeli Adjudication" (1986) 10 Hastings Int'l & Comp. L. Rev. 9 at 28.

Similarity between the two systems can also be seen concerning opinions of lay witnesses. Both systems agree that it is impossible to drew a clear line between facts and conclusion when a lay witness testifies about directly perceived facts. Both systems share the assumption that ordinary witnesses are able to form an opinion upon daily-based common sense. Therefore, their inferences resulting from such common matters associated with facts testified are to be considered.

Despite the differences in treatment, the role of experts and expert opinion have posed serious difficulties in each legal system. Under the Canadian common-law system, there is a tendency for experts to support the party presenting and paying them.[108] This often results in contradictory evidence. The presentation of conflicting expert testimony, which is beyond the knowledge of the trier of fact, is apt to add to the trier's bewilderment rather than to assist in arriving at the truth.[109] The danger is that the court may be induced to believe experts who assert their views in the most persuasive and plausible fashion, and the loss will fall on the party whose expert presents views in a less plausible way.[110]

Dissatisfaction with this has prompted many proposals for reform using the continental system as the point of comparison. Among the proposed reforms[111] is that courts should be provided the power to appoint experts as judicial impartial assistants as done in some common law jurisdictions (U.S.A, England).[112] It has been suggested that, since there is less need for adversarial presentation in the case of an expert than of an ordinary witness, it might be better for an expert to act as a technical advisor to the court, working to inform judges rather than to persuade them.[113]

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[108] Hammelmann, *supra*, n.104 at 33. J. Basten, "The Court Expert in Civil Trials -- A Comparative Appraisal" (1977) 40 Mod. L.Rev. 174.

[109] L.Hand, "Historical and Practical Considerations Regarding Expert Testimony" (1901) 15 Harv. L. Rev. 40; L.M.Friedman, "Expert Testimony, Its Abuse and Reformation" (1910) Yale L.J. 19 at 247.

[110] Hammelmann, *supra*, n.104 at 33; Basten, *supra*, n.108 at 174.

A further suggestion is that experts should be appointed as assessors and masters who enjoy an active role in fact-determination rather than merely "source of evidence".[114] However, these two proposals have rarely been adopted in practice.[115]

With its approach of court-appointment and lack of restrictive evidentiary rules, the treatment of expert opinion in civil law (including Chinese law) is said to avoid the danger of contradictory expert evidence resulting from the "battle of partisan expert witnesses" at common law.[116] Therefore, the Chinese law approach should be seen as a possible model for reform in Canadian adjudication.

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[111] E.g. restricting the unlimited right of a party to call expert evidence by means of requiring a party to disclose expert evidence to his or her opponent as a condition to using it at trial. Moreover, the court may also admit the written statement of an expert without calling him or her as a witness.

Evidence Act R.S.O. 1980, c. 145, s. 52; *Evidence Act* R.S.B.C. 1979, c. 116, ss. 10,11; *Federal Court Rules*, SOR/71-78 Rule 482; Nova Scotia, *Civil Procedure Rules*, 1972, Rules 22.04, 22.05, 31.08.

[112] Basten, *supra*, n. 108 at 185; Weinstock, *supra*, n. 107 at 33.

[113] Hammelmann, *supra*, n.104 at 38-39; also see Generally note, "The Trial Judge's Use of His Power to Call Witnesses - An Aid to Adversary Presentations" (1957) 51 Nw. U. L. Rev. 761.

[114] Weinstock, *supra*, n.107 at 35-36.

[115] *Ibid.*

[116] *Ibid*, at 38; Hammelmann, *supra*, n. 104 at 38.

Nevertheless, deep dissatisfaction exists in the use of expert evidence in China as well. The focus of criticisms is the weight judges should give to expert opinion in reaching a conclusion.[117] Although trial judges are free to make independent evaluations of expert evidence, they are usually incapable of doing so because they lack the necessary technical training to make an authentic criticism. Therefore, the courts are inclined to accept expert opinion at its face value.[118]

Another danger of using expert opinion in the inquisitorial system is as follows:

> It is extremely difficult for the European investigating magistrator or trial judge to avoid the psychology of prosecutor who is a colleague, member of the same judicial corps. Most defendants are guilty anyway...and judge soon conceive their functions in terms of demonstrating guilt. This attitude is easily transferred to the official expert who is in frequent contact with these magistrates. He, too, may easily conceive his role in terms of bringing in an opinion which is favourable to the prosecution. He, too, is interested in punishing the guilty and is aware that most defendants are found guilty. With such an attitude the dice are loaded against the defendant. Expert opinion is sought which is definitely hostile to him, and in the formation of it he has no control.[119]

To curb these defects, it has been proposed that the involvement of the judge in the expert's operations should be increased on the Continent. For example, a 1944 French law entitled the judge to attend the expert's operation and required experts to inform the judge in advance of their progress.[120]

It is also urged that, because of the decisive influence of the report of the official expert, some supervision over his operations by the defence is necessary.[121] For example, in France, it has been suggested that the court is required to appoint a defence expert accompanying the official expert to ensure the accuracy of the official expert's work, and if the two experts come to different conclusions then a third expert would be appointed. However, this reform has not yet been generalized in all criminal cases but only in special cases such as frauds in merchandise.[122]

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[117] Zhang Li Jin, *supra*, n. 76 at 119.

[118] Hammelmann, *supra*, n. 104 at 38.

[119] M.Ploscowe, "The Expert Witnesses In Criminal Cases in France, Germany, and Italy" (1935) 2 Law & Contem. Probs. 504 at 509.

[120] Weinstock, *supra*, n. 107 at 41.

Obviously, as a variant of civil law system, Chinese law as to expert opinion is not an exception to the above mentioned dissatisfactions. Unfortunately, solutions of these difficulties are rarely explored in China. It is the opinion of this writer that the proposed reforms undertaken in Europe should and can find their application in China.

B. Hearsay Evidence

By way of comparing the evidentiary approaches with regard to hearsay rule in Canada and in China, a striking contrast is that the exclusion of hearsay evidence and its exceptions constitutes a primary emphasis on Canadian evidence law, while its technical texture finds no room in the Chinese counterpart.[123] The reasons for the two different approaches are generally attributed to two factors: the jury trial and cross-examination.[124]

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[121] Ploscowe, *supra*, n. 119 at 508.

[122] Ploscowe, *supra*, n. 119 at 508 note 10; also Weinstock, *supra*, n. 107 at 43-44.

[123] There is no discussions on this subject in China, nor is there any relating issues raising in practice. Therefore, this writer tries to analyzes the different treatment of hearsay evidence in Canada and In China by generally comparing common law and the continental law in this regard. This should be workable because Chinese law, as a continental variant, bears great similarities to the civil law with respect to hearsay evidence.

[124] Hammelmann, *supra*, n. 100; also see H. Reiter, *supra*, n. 97 at 57-58.

First, at common law, since the jury is the trier of fact and is composed of lay persons; there is a need to protect the jurors from evidence which may distract or mislead the jury.[125] Therefore, hearsay has been among the most suspect form of evidence in this regard at common law.

Unlike in Canada, trial by jury is not the feature of Chinese criminal process. Judges, trained in the law, are trusted to be capable of coping with the danger of hearsay evidence. Therefore, this absence of the jury as trier of fact demands no need for excluding hearsay evidence during the hearings in China.

Second, the manner of trial determines the need for a hearsay rule. Morgan has put forward that hearsay exclusion as the product of the adversary system.[126] In adversarial proceedings, the judge occupies a passive role over the trial while the conduct of the case is in the hands of the parties. Therefore, cross-examination is vital. By means of this test the parties "demonstrate the strength of his own contentions and expose the weaknesses of his opponent's, the truth will emerge."[127] Hearsay evidence is given without personal responsibility and therefore not subject to cross-examination and possesses no essential guarantee of trustworthiness and is thus generally inadmissible.

In contrast, in Chinese inquisitorial proceedings, the tribunal itself inquires into the truth of the case by collecting, on its own initiative, evidence for establishment of the truth. Accordingly, the presiding judge determines the calling and the questioning of the witnesses. The trust cast upon the ability of the judge in avoiding the danger of hearsay is best described by Hammelmann in the following:

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[125] J. Merryman, *The Civil Law Tradition* 125 (1969).

[126] E.M.Morgan, *The Law of Evidence, Some Proposals for Its Reform* (New Haven: Yale University Press, 1927), E.M.Morgan, "Hearsay Dangers and the Application of the Hearsay Concept" (1948-49) 62 Harv. L.Rev. 177.

[127] Morgan, 62 Harv. L.Rev. at 185.

> In the conduct of his interrogation of the witnesses,... the judge will himself take every conceivable step calculated to assure the trustworthiness source of the testimony offered to him. He will investigate the source of the witness's knowledge, and in doing so he will clearly distinguish between what the witness has seen himself and what he has been told by other. The examining judge will, above all, so frame his questions as to uncover, so far as possible, the weaknesses and inconsistencies of the evidence. In a sense, therefore, his work can be described as including both the task of the examiner-in-chief and of the cross-examiner. When he has completed his work, there will, in any case, be little room for cross-examination. After prolonged questioning by the judge, probably neither the absence of cross-examination nor of the oath can seriously affect the value of testimony in Continental courts.[128]

Clearly, under the inquisitorial system, the protection of judgement from distortion caused by hearsay is the court's interrogation itself. Because of this, hearsay exclusion is thought to be unnecessary.

Notwithstanding this striking contrast, some coincidences between the two treatments of hearsay can be observed. The recent development of Canadian evidence law with regard to the hearsay rule has shown a trend of expanding the list of exceptions. Business records are acceptable notwithstanding that their makers are alive; statements against penal interest are now admissible; prior inconsistent statements may be permitted as proof of the contents if the circumstantial guarantee of reliability is satisfied; etc. This liberal approach is important for understanding the common law attitude moving towards the commitment to the search for truth, which constitutes the essence of the aim of the inquisitorial system. From this standpoint, it can be said that Canadian law and Chinese law in regard to hearsay evidence are moving closer to one another.

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[128] Hammelmann, *supra*, n. 100 at 79.

On the other hand, it must be remembered that the exceptions to the hearsay rule at common law must meet the condition of necessity and trustworthiness (although in some cases necessity is not a prerequisite). A somewhat similar cautious attitude to the use of hearsay evidence can be found in Chinese law. Although hearsay is generally admissible, Chinese courts, however, stress the use of evidentiary sources in their original form. The tribunal is urged to strive to find the original witnesses, and to elicit the truth by investigation of both the original and hearsay evidence. Moreover, in its evaluation, courts do consider the inferior nature of hearsay. Therefore, the use of hearsay in China is not without limitation and caution. At this point, it can be seen that the use of hearsay evidence in both counties, either through the exception rules in Canada or through the relevance rule in China, is paid extreme caution.

The differences of the two approaches as to hearsay should not be overstated. In fact, if we consider the numerous exceptions to the hearsay rule at common law, and the relevance test by the judge and the "best evidence rule" in civil law, it is clear that some evidence excluded in Canada as verbal or written hearsay will be rejected by Chinese courts as well.[129] Indeed, in some situations the hearsay exceptions at common law are more generous in admitting hearsay evidence than under the civil law position.

It is to be noted that common law jurists have criticized the hearsay rule and considered reforms to it.[130] In a working paper on this subject by the Law Reform Commission of New South Wales in Australia, the major objections to the rule are displayed:

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[129] M.Damaska, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedures: A Comparative Study" (1973) 121 U. Pa. L. Rev. 506 at 517-518.

> The most fundamental disadvantage is that the hearsay rule causes much reliable evidence to be excluded, particularly statements by a person who is now unavailable to testify. The exclusion of reliable evidence in this way carries the risk of injustice, a risk which may be most serious so far as an accused is concerned. But there are several objections. The law is obscure, technical, complicated and anomalous, particularly so far as the maze of exceptions to the hearsay rule is concerned. A most important consideration is that the need to tender direct rather than hearsay evidence may substantially increase the costs of litigation and greatly inconvenience the individuals called as witnesses. Serious problems of jury discretion are raised. The rules against hearsay and against proof of a witness' prior statements prevent witnesses telling their story in their own way; they disturb the natural flow of testimony. Practitioners have had to resort to evasive devices which make the operation of the law harder to understand and bring it into contempt.[131]

It is suggested that the continental treatment of hearsay, as compared to that of common law, is more pragmatic and has advantages as to time and expense.[132] Therefore, in view of the reforms of the common law rules, there may be some value in looking at the different approach taken in civil law countries in this regard.[133]

However, it is also to be noted that Chinese law as to hearsay, on the other hand, is rather rough and vague. Except for Articles 31 and 116 concerning general admissibility of hearsay and written hearsay respectively in the *CPC*, there is no other law regarding the manner of its use. A too lax guide could cause danger if insufficient caution is paid by a judge in assessing the relevance of hearsay, or, if any, its evaluation.[134] Therefore, to look at the way the hearsay question is dealt with in Canada, but not to be trapped in its abundance of complex rules, may be of some help to Chinese reforms in this area.

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[130] R. Cross, "What Should be Done About the Rule Against Hearsay?" (1965) Crim. L. Rev. 68; Baker, *The Hearsay Rule* (London: 1050).

[131] (Sydney, 1976) at 9; also L.R.C. (N.S.W.) "Report on the Rule against Hearsay" (Sydney, 1978) at 43. Also see Baker *ibid*.

[132] H. Reiter, *supra*, n. 97 at 72.

[133] *Ibid*, at 52.

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[134] Zhang Zhi Pei, *supra*, n. 81 at 228-229; Chen Ren Hua, *supra*, n. 92 at 19.

GENERAL CONCLUSIONS AND COMMENTS

A. The Contrast Between Complexity and Simplicity

Having scrutinised the general rules of evidence pertaining to witnesses in criminal trials in Canada and China, we can conclude that complexity and technique are major features of Canadian law whereas they do not characterize the Chinese counterpart.

The distinction between the two evidentiary styles emanates from the very nature of the two rival procedural models: the adversarial and inquisitorial systems. Three elements are involved. First, in the manner of party-presentation, formalities as to the procedure and the use of evidence have been highly evolved in the adversarial system to regulate the conduct of the parties for processing criminal cases. In contrast, in the inquisitorial system of judge presentation, the rules as to process and evidence are rather loose and flexible, because presiding judges are entrusted to introduce and use whatever evidence they see fit, complicated rules regulating their conduct of trials are deemed unnecessary.

The second factor stems from the difference in the structure of the adjudicating bodies in the two trial modes. While in Canada rules of evidence are responsive to the demands of trials by a jury of laypersons, Chinese rules are moulded to meet the need of a mixed tribunal. To avoid the danger of distracting or misleading the jury, numerous rules such as those dealing with character and hearsay evidence are predominant in the Canadian system. On the Chinese side, because lay and learned judges sit and deliberate together, there is no fear of distraction of the jury and, accordingly, no necessity for complex rules of evidence.

The third factor contributing to the emergence of distinct evidentiary styles relates to the role played by the trial judge. If judges remain as neutral observers of the "battle" between the parties, one of their tasks is to ensure that the rules of evidence and procedure are complied with by the contending sides during the conduct of their cases. The situation is different when judges act as active controllers of the trial. Under this circumstance, they are entrusted with the power to reach the truth by guiding the process of the trial and the use of evidence. No substantive and complex rules are needed to guide their conduct of the trial, for such rules will be deemed barriers to the finding of the objective truth.

It must be borne in mind that, beside the opposition between the two modes of criminal processes, difference in political and social premises is another element creating distinctions in laws as to witnesses between Canada and China. Canadian democracy, as pluralistic and individualistic as it is, has created its own system of criminal justice administration providing individualized justice and legal complexity. Values such as human dignity and privacy are so highly regarded that the pursuit of truth must yield to the protection of individualism. This gives rise to numerous rules such as the right against self-incrimination, marital communication privilege and so forth.

In contrast, Chinese authoritarianism has produced an atmosphere encompassing a general interest in the system itself as an abstract entity. Evidentiary complexity is viewed not only as a limitation on the search for truth, but more importantly, as the distrust of the state's ability to protect the nation's interest as well as that of the individuals. Deriving from this conceptual base, it is not surprising that the rules regarding witnesses, which form a part of the Canadian evidence law, are almost absent in China.

Descending into the specific aspects of witnesses rules, one finds that the distinction between the two countries on this score is clearly reflected. With respect to testimonial competence, there are stricter rules in Canada than in China. First, while the Canadian law generally requires an oath or affirmation as a pre-condition to receipt of oral testimony, there is no equivalent requirement in China. Second, Canadian law requires categories of incompetent witnesses (the accused and the co-accused, spouses of the accused and, those incapable of taking an oath or affirmation). Chinese law, however, ignores all these rules creating limitations (except for the incompetence of co-accused for the Crown). Every person who knows the facts of the case, including the accused and that person's spouse, must give evidence before the court.

In the area of privilege, numerous rules have been set up in the Canadian law to prevent the compelled disclosure of certain communications. Generally they are: the accused's right to remain silent at pretrial stage and his right to refuse to enter the witness's box; the solicitor-client privilege; the marital communication privilege and the protection to the police informers. In contrast, the Canadian complex network of rules as to privilege is avoided in China. The sole exception is the client-solicitor privilege.

The pattern of examination-in-chief and cross-examination of witnesses in Canada has resulted in a bewildering, complicated array of evidentiary rules. In the direct examination, the general rules are as follows:

a) Although leading questions are prohibited, an unclosed list of exceptions has been well established (e.g. undisputed matters);

b) During the refreshing memory of witnesses, the issues as to the distinction between the conceptions of "present memory revived" and "past recollection recorded" and their respective use must be paid enough attention;

c) Calling parties are not permitted to discredit their own witness unless the witness proves adverse. Impeachment includes two aspects: to call other witnesses to prove the facts are otherwise, or to produce the witness's prior inconsistent statement in order to contradict his present testimony;

d) A calling party cannot produce evidence supporting the credibility of his own witness unless the credibility of the witness has been attacked by the opposite side. However, under the circumstances of prior identification, adn alleged recent deliberate fabrication, supporting evidence of the witness's character may be permitted.

During cross-examination, the truthfulness of a witness can be weakened by the opposing party through the production of the witness's previous inconsistent statement, proof of bias, evidence of bad character or deficient capacity of perception, recollection and communication. It is to be noted that evidence as to the accused's bad character, apart from a prior conviction, is not permitted if it is introduced solely for the purpose of impeachment. In cases of sexual assault, evidence as to the complainant's general sexual reputation is not admitted. With respect to her past sexual conduct, if such evidence is thought to have probative value on an issue at trial, it is to be admitted for the purpose of truthfinding.

Compared with the Canadian counterpart, evidentiary doctrine guiding the examination of witnesses in China is surprisingly simple. As a result of the judge's active control over the trial, there is no definite formality of direct examination and cross-examination. The power of admitting and evaluating all evidence is committed to the discretion of the presiding judge, therefore, the complexity of fixed evidentiary rules is not needed. Although the rules as to leading questions and refreshing memory are relatively definite, they are still much simpler than that of the Canadian law. As to character evidence, its use is determined by the judge based on the relevance of such evidence to the case.

The feature distinguishing Canadian evidentiary complexity from Chinese simplicity in evidence law is most obviously exhibited in the field of the opinion evidence and hearsay rules. Treated as ordinary witnesses, experts in Canada are subject to all of the evidentiary rules applicable to ordinary witnesses during the examination. In other words, the rules as to prior inconsistent statement; character evidence; proof of bias or the deficiency of the capacity of telling the truth; the impeachment of one's own witnesses and so forth, are applied to the examination of expert witnesses. In China, stemming from the active position of the judge, experts are treated as trial assistants. There is no rule governing the explanation of their opinion as to certain matters and the presiding judge determines the wight of such testimony. If considering that the evidence of the expert is insufficiently convincing, it is the judge's discretion to order other experts to give opinion on the same matter.

Emerging from the concern of the jury and cross-examination, hearsay rules constitute a major part of Canadian evidence law. The basic rule is that, although hearsay is generally unacceptable, numerous exceptions have none the less been evolved. A long, traditional list of common law exceptions has developed. Additionally, the Canadian law has adopted Wigmore's approach of creating new exceptions: if the factors of necessity (unavailability, insanity, etc.) and circumstantial guarantee of trustworthiness are available, hearsay evidence may be accepted. The result has been that a number of new exceptions have emerged, especially in cases involving young children's statement. Moreover, the myriad of statutory hearsay exceptions, particularly in the case of documentary evidence (i.e. statement recorded in the course of duty) must not be forgotten. All of these developments in creation of new exceptions in part supplement the common law or expand the parameters of existing common law exceptions. Composed of these endless exceptions, it is not surprising that the hearsay body under the Canadian evidence law is bewildering, complicated and extremely technical.

Chinese law, on the contrary, relies on almost no rules as to hearsay. Hearsay evidence is generally permitted, with the only exception that written depositions are excluded unless the declarants are unavailable. Again, flowing from the concept of the active rule of the judge at trial, the court is believed to be able to reach the real truth of the case. Without the fear of misleading the jury, and the concern with cross-examination as a guarantor of truthfulness, hearsay is regarded as having a material bearing through inferential information with respect to the facts of the case. It is therefore reasonable to admit such evidence for the purpose of helping the judge to clarify the truth.

B. The Common Trend of Approaching Toward One Another

1. Similarities

Another conclusion yielded from the comparative observation of the laws regarding witnesses in Canada and China is that, notwithstanding the differences, some common points can be found in both systems.

It is to be remembered that the essential factor leading to this convergence between the two evidentiary systems is the very nature of criminal justice. To unveil the truth of a case, proceedings of truthfinding are set up in both common law and civil law regions. Each style of process, be it adversarial or inquisitorial, and be it complicated or simple, is aimed at the accuracy and fairness of the verdict. Therefore, it is unavoidable that certain similarities, in terms of techniques of processes, are shared by the two evidence law systems.

Generally, the similar aspects are:

a. Co-accused are incompetent to testify against one another in both countries. If tried separately or acquitted, either of the co-accused then become competent to testify for the Crown;

b. Solicitor-client privilege is recognized in both systems;

c. Although far simpler in Chinese law, the rule prohibiting leading questions and the rule of refreshing memory are present in the two countries;

d. Notwithstanding the absence of definite formality as to exclusionary rules of witness's credibility in China, similar devices have been established to exclude such evidence. From the perspective of relevancy and materiality and the rule of "primary evidence" and "secondary evidence", many items of evidence as to credibility which are not permitted in Canadian courts, will not be admissible in Chinese courts as well.[1] Considering the numerous rules with respect to the exclusion of character evidence in the Canadian law, the distance between the two systems on the issues of admitting evidence as to credibility is not too great.

e. Although no exclusionary rules as to hearsay have been created in Chinese law as compared with that of the Canadian law, the rule of best evidence plays a similar role. Considering the inferior nature of hearsay, Chinese courts stress the use of evidentiary sources in their original form. The tribunal is urged to find the original witnesses and to elicit the truth from both immediate and second-hand information. Therefore, if sufficient original evidence is available for the truthfinding, the trial judge is entitled to reject the use of hearsay evidence. From this point of view, it is clear that some hearsay evidence excluded in Canadian courts will be also rejected by Chinese courts.

f. As to opinion evidence, two parts are to be noted. First, the "ultimate issue rule" is recognized in both countries. Experts are required to give opinions on the mere matter involving special knowledge beyond the ken of the jury and the judge. They can not answer the questions involving legal elements which are regarded as the matters for the jury to determine. Secondly, both systems agree that lay witnesses are able to form opinions upon day-to-day common matters. Their inference as to such matters associated with facts testified by him (her) is to be heard in the court.

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[1] An excellent discussion on this subject is displayed in K.H.Kunert, "Some Observations on the Origin and Structure of Evidence Rules Under the Common Law System and the Civil law System of 'Free Proof' in the German Code of Criminal Procedure" (1966-67) 16 Buff. L. Rev. 122 at 156-160.

2. The Trend of Approaching Toward Each Other

Each striving for discovery of truth, a recent development in both evidence law systems seems to be that ideological and technical assumptions are replaced by more realistic and commonsense views. The result is that more relevant evidence is introduced and it is submitted to the trier of fact in a way that facilitates its unbiased evaluation.

In Canada, the conflict between the discovery of truth and evidentiary barriers justified by the jury trial or the social policies has been mitigated by a great deal of relaxation of the exclusionary rules. In an attempt to prompt a more efficient form of process for truthfinding, the scope of admissible evidence is largely widened. A striking example is that, although oath or affirmation remains a pre-condition to competency, unsworn testimony of certain persons (the young, the elderly or the mentally disabled) is receivable provided they possess the power to communicate and they promise to speak the truth.

Moreover, spousal incompetence and marital communication privilege no longer survive annulment of marriage, divorce and irreconcilable separation. In addition, privilege against self-incrimination of witnesses does not exempt the witnesses from answering incriminating questions; the protection being that such answer shall not be used against the witnesses in any other criminal proceedings. The accused's protection against self-incrimination merely means the right not to enter the witness box. If choosing to testify, the accused is treated as an ordinary witness and is not exempted from answering incrimination questions.

A recent important change in Canadian evidence law toward admitting more relevant evidence is reflected in the use of character evidence. In *R.* v. *Seaboyer*,[2] the Supreme Court ruled that, in cases of sexual assault, the complainant's past sexual conduct is admissible provided it bears probative value on the issue at the trial. This decision undoubtedly widens the scope of admissible evidence for the purpose of search for truth.

With regard to hearsay rules, recent developments in Canadian evidence law have shown a trend toward expanding the list of exceptions. Examples are: business records are admissible notwithstanding their makers are alive; statements against penal interest are receivable and; prior inconsistent statement are permitted as proof of the contents if circumstantial guarantee of reliability is satisfied. The expansion of the exceptions list manifests the Canadian adversarial process is geared to the further commitment to the search for real truth.

On the Chinese side, the typical feature of its criminal evidence law is the strong and active role of judges, reflecting enormous confidence in their ability to be both active and impartial and to give every item of relevant evidence the wright that it deserves. Such confidence in their ability to perform the superman's role at trial has given rise to the practice that judges sometimes weighs evidence they had not even heard or seen. The trend of modern developments, as in the Canadian evidence law, is toward a more realistic view, based on the experience that too great a confidence in the judges' ability to combine the rules of both the proponent and evaluator of the evidence may tend to generate prejudice on their part. Therefore, the parties are accorded the right by the law to move for the reception of evidence and to adduce evidence themselves.[3] This is designed to compel the admission of relevant evidence that the judge originally thought unnecessary. This has added to the modern Chinese criminal process a marked adversarial feature and yet, has preserved the character of the active performance by the judge at trial.

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[2] (1992) 66 C.C.C. (3d) 321 (S.C.C.).

C. Recommendations on the Improvement of Both Systems

It should be realised that any flaws in Canadian and Chinese bodies of evidence law cannot be cured by directly applying each other's devices. After all the complexity in the Canadian law and the simplicity in the Chinese law are results of their respective political and social reality. To tell Canadians to simply reduce that complexity or Chinese to set up a ready-to-hand network is as fruitless as a medical prescription which cures symptoms instead of the disease itself.

None the less, it should be remembered that the purpose of comparative research of evidentiary styles is to improve the systems by taking each other's advantages into consideration. A possible way is that the Canadian and Chinese experiences with similar problems may serve as a guideline for the reform of the two systems, rather than as a substitute for one another.

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[3] *Criminal Procedural Code of the People's Republic of China* trans, Chin Kim in *The American Series of Foreign Penal Codes* v. 026 (London: Sweet & Maxwell, 1985) 33.

> Article 115 reads:
> Parties and defenders may request to have the presiding judge put question to witnesses and expert witnesses or they may question them directly with the permission of the presiding judge.
>
> Article 117 reads:
> ... parties and defenders shall have the right to request new witnesses to come to court, obtain new material evidence, and to request new expert evaluation or reinspection.
> The court shall decide whether or not the above requests should be approved.

The primary end of both criminal procedures is to discover the objective truth and to reach fair and accurate verdicts. It is this very goal of the criminal trial that has driven the two evidentiary systems closer to one another through the relaxation of exclusionary rules. It is also this very point that has led comparatists to propose further reforms enhancing the trend towards the commitment to search for truth in the two countries. The result will be, if these suggestions are to be practically applied to, that the two evidence law systems will approach further toward each other.

a. Along with the secularization of the contents of an oath, it is submitted that the form of oath should be abolished. Instead, an universal requirement of affirmation should be adopted.[4] The justification is three-fold: a) scientific evidence does not support the assumption that an oath is a greater guarantor of the truth than affirmation; b) the jury might attach unwarranted importance to the evidence given under oath as compared to the evidence given under affirmation and; c) for many non-Christian religions, the alternative forms of oath are either non-binding or fictionalized accounts of other traditions. Taking these considerations into account, it might be beneficial to the effectiveness of truthfinding in the Canadian criminal trials if Canada adopts the oath abolition proposal.[5]

b. Although the scope of testimonial competency in China is rather wider than that in Canadian law, its lack of force to compell the attendance of witnesses has caused great hardship in obtaining testimony in practice. A convenient way to remove this defect is to look at the methods used in Canada: imprisonment or fine. Undoubtedly the adoption of these measures will largely increase the rate of witnesses' attendance in Chinese courts.

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[4] Law Reform Commission of Ireland, *Report on Oaths and Affirmations* (1990) at 35-40.

[5] Oath is retained as an alternative form of affirmation in Canada. *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (1982) at 234-240.

c. Some commentators have suggested that the active role of the judge in continental criminal courts should be helped with appropriate cross-examination.[6] This writer is of the opinion that this proposition is desirable in Chinese criminal trials. Legal training does not necessarily enhance the judge's capacity to determine whether a witness is mistaken or biased. Cross-examination can efficiently help elicit these possible perceptual defects. Therefore, party-presentation may sometimes be allowed in Chinese courts, without the tight control of the judge. Accordingly, relating evidentiary rules governing the operation of party-presentation should be built up. On this score, the Canadian definite and precise network of evidence rules will have some value of help. Yet, this is by no means the wholesale adoption of the common law complex evidentiary limitations on impeachment and accreditation of witnesses.

d. Evidentiary rules guiding the examination of witnesses in Canada are rather bewildering and confusing. The result might be that judges are so preoccupied with the fixed measures of exclusion that they have insufficient chance to explore the real cogency of evidence. Such a waste of the judge's energy undoubtedly deters the efficiency of truthfinding. To remove this defect, a valuable reform sould be to leave the admissibility of some evidence, for either impeachment or accreditation of witnesses (e.g. the witness' prior inconsistent statement to support or attack his truthfulness), to the discretion of the trial judge, instead of subjecting the judge to fixed rules.

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[6] W.Zeidler, "Evaluation of the Adversary System: As Comparison, Some Remarks on the Investigatory System of Procedure" (1981) 55 The Australian Law Journal 390 at 397.

e. As to expert opinion, the danger of an adversarial presentation is that the judge may be swayed by the most persuasive expert rather than the most solidly based opinion. A way of curing this weakness is to let experts act as judicial technical consultant through the appointment by the court instead of letting them called by the parties. This can be achieved because there is less need for an adversarial presentation in the case of an expert than an ordinary witness. When the disputed matter at trial is the expert's opinion and not the expert's veracity, there is little value for the jury to observe the demeanour of the expert. Therefore, using the Chinese system as the point of comparison, Canadian law as to expert opinion may be improved by considering the court's appointment of experts as technical assistants.

As to the Chinese law of expert evidence, the concern is that the judge may accept expert opinion at face value. Moreover, as a result of a system in which the investigator, prosecutor and trial judge are colleagues in the same judicial corps, the official expert's opinion may well be favourable to the prosecution, i.e. it tends to support the accused's guilty. To prevent these two defects, judicial involvement of the judge in the expert's operations should be enhanced. Meanwhile, more supervision over the operation of experts by the defence is needed.

f. The hearsay rules at common law have been criticized for their complexity and expensive cost of time and labour. Furthermore, a major objection is that they exclude many items of relevant evidence and thereby lowers the quality of criminal justice. Thus, in view of trimming the Canadian hearsay rules, the Chinese approach may be of some value. Based upon the principle of best evidence and the relevance and materiality rules, the admissibility of hearsay evidence in China is solely within the discretion of the presiding judge. This helps avoid the weaknesses mentioned above. Rather, the Chinese treatment of hearsay is more pragmatic and it saves time and expense. For this reason, looking at the Chinese method in question, it has advantages over the Canadian law regarding hearsay.

However, the Chinese treatment of hearsay is not faultless. It is too rough, thereby raising dangers of injustice, needless expenditure of time and energy if the judge misjudges the relevance or necessity of hearsay. Hence, learning something form the Canadian precision of hearsay rules, but not to be trapped in its abundance of bewilderness, may be help to improve the Chinese law as to hearsay evidence.

D. An Unsettled Question

The overall comparison of the laws as to witnesses in Canada and China reveals that the Chinese system exhibits a greater commitment to the pursuit of truth. Accordingly, this disparity in finding the historic verity has caused the Canadian law to erect higher evidentiary barriers in truthfinding than the Chinese counterpart.

However, it would be a mistake to conclude that the system placing a higher premium on the discovery of truth is better equipped to achieve the precision of real truth. While commitment to the truthfinding and success in attaining it are connected, they are none the less distinguishable. Damaska explains the relationship between the two factors clearly in the following:

> Motivation is surely important for the success of such an endeavour, but it is by no means a sufficient condition for it. ... if the non-adversary system in its continental variant is indeed more committed to ascertain historic verity, this does not mean that its factual findings are ipso facto more reliable.[7]

Therefore, the proposition that one type of evidentiary structure is superior to the other in terms of factfinding precision and fairness of criminal process must be examined with suspicion. This question can not be properly answered unless sufficient knowledge as to behavioral sciences, especially in the area of psychology, is obtained.[8] Furthermore, an answer to this question is difficult because, in the construction of evidence doctrine, there is always a point at which factfinding precision must give way to other societal values. In the law as to testimony, it often happens that what is gained at one point is lost at another.

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[7] M.Damaska, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study" (1972-73) 121 U. Pa. L. Rev. 506 at 588.

[8] Thibaut, *et al*, "Adversary Presentation and Bias in Legal Decisionmaking" (1972) 86 Harv. L. Rev. 386; Walker, *et al*, "Order of Presentation at Trial" (1972) 82 Yale L.J. 216.

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